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**PROCEDURAL FAIRNESS REQUIREMENTS IN DECISION-MAKING:
LEGAL ISSUES AND CHALLENGES FOR GOVERNMENT SECONDARY
SCHOOL PRINCIPALS IN NEW SOUTH WALES**

Tryon Francis

BSc(Hons)/BEd (*W.Aust*), LLB (*UNDA*), GDLP (*ANU*), LLM (*ANU*)

Submitted in Fulfilment of the Requirements for the Degree
Doctor of Philosophy



School of Law
Fremantle Campus
August 2021

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ABSTRACT

The application of the rules of procedural fairness, which is an element of administrative law, is an area of law that has not been previously examined in the context of government (public) secondary school principals in New South Wales ('NSW'). Using a basic qualitative case study design, this study sought to discover the processes that these principals undertook in applying the rules of procedural fairness when managing student discipline, special education and industrial relations. The study examined to what extent New South Wales government (public) secondary school principals were equipped to make decisions that are consistent with the administrative law principles of procedural fairness. NSW Department of Education secondary school principals, in-house legal officers and external lawyers were interviewed to ascertain how school principals undertook the complex and challenging task of decision-making in accordance with the rules of procedural fairness given they receive no formal training. The study provides findings in terms of four broad themes which are developed from case law, literature and the study (procedural fairness in policy and procedures; student wellbeing and procedural fairness; industrial relations and procedural fairness; and legal training in procedural fairness) where the rules of procedural fairness dictate the process a government secondary school principal ought to undertake. The study found that NSW government secondary school principals did undertake the application of the rules of procedural fairness to an appropriate standard; however, the ways in which the participants undertook informal learning at the deputy principal level could be an area for improvement by the NSW Department of Education prior to individuals being appointed to principalship to reduce any actual or perceived risk.

DECLARATION

To the best of the candidate's knowledge, this thesis contains no material previously published by another person, except where due acknowledgement has been made.

This thesis is the candidate's own work and contains no material which has been accepted for the award of any other degree or diploma in any institution, unless acknowledged.

Human Ethics. The research presented and reported in this thesis was conducted in accordance with the National Health and Medical Research Council National Statement on Ethical Conduct in Human Research (2007, updated 2018). The proposed research study received human research ethics approval from the University of Notre Dame Australia Human Research Ethics Committee (EC00418), Approval Number #017126F.

Signature: 

Print Name: Tryon Francis

Date: August 2021

ACKNOWLEDGEMENTS

I would like to acknowledge and thank my principal supervisor, Professor Joan Squelch, and Professor Kevin Watson, with whom I have had the privilege of working with as colleagues for several years.

Thank you to the New South Wales Department of Education for allowing me to undertake this research and for the principals and lawyers who gave up their valuable time to be interviewed. This research would not have been possible without your valuable contributions.

Thank you to the private law firm solicitors and barrister who willingly participated in the research; your insights were greatly appreciated.

Finally, but certainly not least, to my mother who has listened to ‘PhD talk’ for many years. Thank you for your support over the years and degrees.

This research was supported by an Australian Government Research Training Program (RTP) Scholarship. The research was also supported by a Department of Defence, Prince of Wales Award.¹

I have received professional editorial advice from Josephine Smith – Wordsmith WA. In accordance with the *Guidelines for Editing Research Theses* produced by the Institute of Professional Editors Ltd, the editorial intervention has been restricted to copyediting and proofreading. This type of advice is covered in Standards D and E of the *Australian Standards for Editing Practice*. All errors are my own.

¹ Australian Government, Department of Defence, ‘Prince of Wales Award’, *Awards and Recognition* <<https://www.defencereservessupport.gov.au/benefits/awards-and-recognition/>>.

PUBLICATIONS

Publications associated with the PhD project

Tryon Francis, 'Principals, Alternative Dispute Resolution, and Procedural Fairness in Australian Public Schools' (2020) 23 *International Journal of Law and Education* 85.

Publications not associated with the PhD project

Tryon Francis, Shannon Kennedy-Clark, Katrina Eddles-Hirsch and Cynthia a'Beckett, 'Developing a Shared Understanding of a Sense of Community in Large University Classes' (2020) 3(1) *Global Research in Higher Education* 25.

Katrina Eddles-Hirsch, Shannon Kennedy-Clark and Tryon Francis, 'Developing Creativity through Authentic Programming in the Inclusive Classroom' (2019) 48(8) *Education 3-13* 909.

Shannon Kennedy-Clark, Katrina Eddles-Hirsch, Tryon Francis, Grace Cummins, Luke Feratino, Matthew Tichelaar and Lloyd Ruz, 'Developing Pre-Service Teacher Professional Capabilities through Action Research' (2018) 43(9) *Australian Journal of Teacher Education* 39.

Robert Pelletier, Boris Handal, Jessica Khalil and Tryon Francis, 'Cyberbullying: Where does a School Authority's Liability in Tort End?' (2015) 6 *The West Australian Jurist* 93.

ACRONYMS AND ABBREVIATIONS

ACARA	Australian Curriculum, Assessment and Reporting Authority
AITSL	Australian Institute for Teaching and School Leadership Ltd
ANZELA	Australian and New Zealand Education Law Association
AP	Assistant principal
CAQDAS	Computer-assisted qualitative data analysis software
DEL/s	Director/s, Educational Leadership
EAL/D	English as an additional language or dialect
EPAC	Employee Performance and Conduct Directorate
HR	Human resources
HSC	High School Certificate
ICT	Information Communication Technology
NAPLAN	National Assessment Program – Literacy and Numeracy
NESA	New South Wales Education Standards Authority
NSW	New South Wales
QDAS	Qualitative data analysis software
SERAP	State Education Research Application Process
UK	United Kingdom
UNCRC	United Nations Conventions on the Rights of the Child
US	United States
WA	Western Australia
WHS	Workplace health and safety

NOTE TO READER

The terms government school and public school are used interchangeably throughout this thesis and are given the same meaning. That is, education provided by the State of New South Wales under the *Education Act 1990* (NSW).

In the Australian Guide to Legal Citation (AGLC) 4th edition subsequent referencing may be used as follows [Author surname/case name] n (footnote number) [pinpoint]; however, this is not required (Rule 1.4.1). In this thesis [n reference] is not used to enable easier readability. The term ‘Ibid’ is used in this thesis to reference a source immediately preceding the footnote, including any pinpoints.

CHAPTER 1

INTRODUCTION AND STATEMENT OF THE RESEARCH PROBLEM

1.1 INTRODUCTION

School principals work in institutionalised environments that are deeply complex organisations² and they are required to make a wide range of administrative decisions that are legally correct. Such decisions often come under review by students, parents, lawyers, teachers, unions, the New South Wales ('NSW') Department of Education and the wider community. These increasing demands on a school principal to make legally sound decisions that are consistent with administrative law, in particular the rules of procedural fairness, appear to be unrealistic when the principal, in many instances, has had no formalised training or professional development in procedural fairness, which provides the legal basis for administrative decision-making. Yet, the NSW Department of Education expects its school leaders to be able to make decisions that can be subjected to internal and/or external review. The *CCH Australian School Principals' Guide* (now decommissioned) assumes that in the day-to-day administration of schools, principals may have to attend to a range of legal matters and typically spend between 20% to 30% of their time managing them; however, this was not quantified by any actual study.³ Previous Australian research⁴ has identified that Australian school principals spend a considerable portion of their working week dealing with and managing issues of a legal nature. Stewart⁵ comments that 'attending to legal matters is time consuming and leaves less time and other resources for instructional leadership'. The key questions raised are:

- 1) How do government school principals obtain their legal knowledge?

² Simon Clarke and Helen Wildy, 'Preparing for Principalship from the Crucible of Experience: Reflecting on Theory, Practice and Research' (2010) 42(1) *Journal of Educational Administration and History* 1.

³ CCH, *Australian School Principals Legal Guide*. There is no formal requirement for principals to understand the content in the Guide, rather, this was a loose-leaf service that principals could consult if they had access. Some sections of the Guide were last updated in 2009, and other sections such as bullying were updated more recently in 2018.

⁴ Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge Needed and Held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996); Paul McCann, 'Principals' Understanding of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006); and Allison Jane Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact of Law on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017).

⁵ Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge Needed and Held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996), 232.

- 2) How do school principals apply this legal knowledge when undertaking the complex task of decision-making to ensure their decisions are in accordance with the rules of procedural fairness?

This thesis contends that NSW government secondary school principals require a basic knowledge and understanding of the law to implement the administrative law requirement of procedural fairness in their decision-making processes. Generally, however, few principals have any formalised legal training.⁶

The purpose of this thesis is therefore to identify what legal knowledge NSW government secondary school principals have in relation to the rules of procedural fairness and to compile a set of recommendations for the design of an education law course specialising in the general principles of administrative law, which is a complex area of law, and the rules of procedural fairness for school principals. In this thesis, it is argued that given the complex nature of the legal environment in which schools operate, there should be formal training in education law for principals and school administrators in applying the rules of procedural fairness in decision-making. As noted by several authors⁷ a course in education law would be beneficial to schools and school principals. It is through an understanding of the types of legal issues that principals deal with, predominantly in the areas of student discipline, special education and industrial relations, that an education law program focusing on the rules of procedural fairness could be designed and implemented to best cater for school leaders' needs, ensuring their decisions are not overturned by internal or external review authorities.

⁶ Allison Trimble, "Working in the Dark": Principles and the Law' (2018) 24(1) *Leading and Managing* 16; Nora M Findlay, 'In-School Administrators' Knowledge of Education Law' (2007) 17(2) *Education & Law Journal* 177; Pricilla Naidoo, 'Legal Literacy: Auckland Secondary School Principals' Knowledge of Educational Law' (MEd Thesis, Auckland University of Technology, 2018); David Schimmel and Matthew Militello, 'The Risks of Legally Illiterate Teachers: The Findings, the Consequences and the Solutions' (2011) 6 *UMass Law Review* 37; David Schimmel and Matthew Militello, 'Legal Literacy for Teachers: A Neglected Responsibility' (2007) 77(3) *Harvard Educational Review* 257.

⁷ David Schimmel, Suzanne Eckes and Colleen Chestnut, 'Legal Literacy for Charter School Personnel' (Conference Paper, Education Law Association Conference, 2013); Douglas Stewart, 'The Place of Law in the Leadership and Management of Schools' (2005) 17(4) *Education and the Law* 127; Ralph Mawdsley and Joy Cumming, 'The Origins and Development of Education Law as a Separate Field of Law in the United States and Australia' (2008) 13(2) *Australian and New Zealand Journal of Law and Education* 7; Jerome G Delaney, 'The Value of Educational Law to Practising Educators' (2009) 19 *Education & Law Journal* 119; Matthew Militello, David Schimmel and Howard Jacob Eberwein, 'If They Knew They Would Change: How Legal Knowledge Impacts Principals' Practice' (2009) 93 *NASSP Bulletin* 27; Howard J Eberwein III, 'Raising Legal Literacy in Public Schools, a Call for Principal Leadership: A National Study of Secondary School Principals' Knowledge of Public School Law' (EdD Thesis, University of Massachusetts, 2008).

This chapter establishes the framework of the thesis and states the research problem and questions. A brief overview of the methodology is provided as well as the scope, limitations and structure of the thesis. In addition, the potential contributions to education law research are introduced.

1.2 GENERAL STATEMENT OF THE PROBLEM AND BACKGROUND

Stewart⁸ is the only study conducted in Australia that exclusively examined the legal literacy of government school principals.⁹ The study investigated the general legal knowledge of school principals in Queensland public (government) schools¹⁰ and found that school principals needed professional knowledge of education law to understand legislation, common law, criminal law and grievance procedures.¹¹ It is the purpose of this thesis to examine the grievance procedures in relation to the rules of procedural fairness in the government school educational context in New South Wales. Stewart¹² recommended pre-principalship programs, onsite training of school principals and induction courses in education law. Trimble,¹³ in their Tasmanian study of school principals' legal literacy, also found that strengthening the legal training for aspiring principals, practising teachers and pre-service teachers reflected the research already conducted by previous Australian education law research.¹⁴ Few of these recommendations have been formally acted upon by the NSW Department of Education. There is no requirement for a future school principal to undertake a course in education law or understand the rules of procedural

⁸ Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge Needed and Held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996).

⁹ See Allison Jane Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact of Law on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017), which compared the legal literacy of government, Catholic and independent school principals in Tasmania; Paul McCann, 'Principals' Understanding of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006), which examined principals' legal literacy in Catholic schools in Queensland; David J Newlyn, 'The "Legalisation" of Education: A Study of New South Wales Teachers and their Professional Development Needs in the Area of Law' (PhD Thesis, University of Wollongong, 2006), which examined the degree of legal knowledge held by teachers in government schools in New South Wales; Mary Keeffe, 'Legal Tensions in the Governance of Inclusion: Principals' Perspectives on Inclusion and the Law' (PhD Thesis, James Cook University, 2004), which examined the disability discrimination legislation and decision-making of school principals in Queensland state (government) schools.

¹⁰ Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge Needed and Held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996).

¹¹ Ibid.

¹² Ibid.

¹³ Allison Jane Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact of Law on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017).

¹⁴ Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge Needed and Held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996); Paul McCann, 'Principals' Understanding of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006).

fairness. The University of Western Australia,¹⁵ The University of New South Wales,¹⁶ and the Australian Catholic University¹⁷ have all attempted to address the issue of school principals' legal literacy in relation to legal issues in schools. McCann investigated the Catholic education system in Queensland and found that principals were deficient in their ability to deal with the legal issues that confronted them daily.¹⁸ Similarly, in Queensland, Keeffe investigated the legal tensions associated with the governance of inclusion.¹⁹ Keeffe identified that school principals did not understand the procedural protocols of natural justice (procedural fairness) when dealing with students with disabilities.²⁰ In New South Wales, Newlyn investigated teacher legal knowledge and requirements; however, they did not address procedural fairness.²¹

In 2013 the Western Australian Department of Education identified the legal literacy requirements of aspiring school principals by providing school administrators with a 36-hour elective course in education law²² as part of a Master of Educational Leadership program at The University of Western Australia; however, this course is not always offered.²³ Similarly, a number of other education law courses are offered from time to time nationally such as Education Law and Ethics at La Trobe University²⁴ which is designed for master of teaching students which is a pre-service teacher qualification, the Graduate Certificate in Education Law from the Australian Catholic University,²⁵ which is designed for candidates with a teaching

¹⁵ The University of Western Australia, 'EDUC5523 Education Law', *Unit Details* (Web Page) <<http://handbooks.uwa.edu.au/units/unitdetails?code=EDUC5523>>.

¹⁶ The University of New South Wales, 'Legal, Industrial & Ethical Issues in Educational Leadership: EDST5439', *Handbook 2015* (Web Page) <<http://legacy.handbook.unsw.edu.au/postgraduate/courses/2015/EDST5439.html>>; NSW Government, Department of Education, 'Leading the Management of the School', *Teaching and Learning* (Web Page) <<https://education.nsw.gov.au/teaching-and-learning/learning-from-home/leading-at-home/leading-the-management-of-the-school>>.

¹⁷ Australian Catholic University, 'Graduate Certificate in Education Law' (Web Page) <https://archives.acu.edu.au/handbook/handbooks/handbook_2014/faculty_of_law_and_business/coursecampus_tables/postgraduate_courses/graduate_certificate_in_education_law.html>.

¹⁸ Paul McCann, 'Principals' Understanding of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006).

¹⁹ Mary Keeffe, 'Legal Tensions in the Governance of Inclusion: Principals' Perspectives on Inclusion and the Law' (PhD Thesis, James Cook University, 2004).

²⁰ Ibid.

²¹ David J Newlyn, 'The "Legalisation" of Education: A Study of New South Wales Teachers and their Professional Development Needs in the Area of Law' (PhD Thesis, University of Wollongong, 2006).

²² The University of Western Australia, 'EDUC5523 Education Law', *Unit Details* (Web Page) <<http://handbooks.uwa.edu.au/units/unitdetails?code=EDUC5523>>.

²³ The University of Western Australia, 'Master of Educational Leadership: Coursework', *Course Details* (Web Page) <<https://www.uwa.edu.au/study/courses/master-of-educational-leadership---coursework>>.

²⁴ La Trobe University, 'LAW5EDU Education Law and Ethics', *Handbook 2022* (Web Page) <<https://handbook.latrobe.edu.au/subjects/2022/law5edu>>.

²⁵ Australian Catholic University, 'Graduate Certificate in Education Law' (Web Page) <https://archives.acu.edu.au/handbook/handbooks/handbook_2014/faculty_of_law_and_business/coursecampus_tables/postgraduate_courses/graduate_certificate_in_education_law.html>.

qualification, and the University of Technology Sydney offers a course on the Law and Education as part of a bachelor of laws degree.²⁶ Previously, the NSW Department of Education through The University of New South Wales offered an elective education law program.²⁷ The assumption is made that school principals should be able to make decisions in accordance with procedural fairness at their schools independently. McCann identified that ‘a more formal and structured approach is required’ with the finding that ‘involvement with legal issues and participation in formal and less formal personal and professional learning activities presently available do not necessarily contribute to a more accurate understandings of such matters.’²⁸ The timing of this study fits in with the current movement and requirements of the Australian Institute for Teaching and School Leadership and state-based departments of education, and could be implemented in an education law program for school administrators (deputy principals, principals, director educational leadership) to address the complex decision-making process in accordance with the rules of procedural fairness.

Research undertaken in other countries raises similar issues and concerns. Eberwein²⁹ identified 78 education law studies in the United States (‘US’) that examined school principals and their legal knowledge. However, Eberwein’s data is over thirteen years old, and the number of studies is no doubt much larger. One only has to attend the annual Education Law Conference to be exposed to multiple doctoral studies concerning school principals’ legal literacy.³⁰ It has been reported that US principals have a greater understanding of education law issues compared with Australian school principals when managing the school environment.³¹ Despite the logical reasons for principals having an appropriate understanding of the law, a number of US, Canadian, and Australian studies have shown that this is not generally the case.³² Education law

²⁶ University of Technology Sydney, ‘78040 Education: Rights and Responsibilities’, *Handbook 2021* (Web Page) <<http://handbook.uts.edu.au/subjects/details/78040.html>>.

²⁷ The University of New South Wales, ‘Legal Industrial and Ethical Issues in Educational Leadership: EDST5439’, *Handbook 2015* (Web Page) <<http://legacy.handbook.unsw.edu.au/postgraduate/courses/2015/EDST5439.html>>.

²⁸ Paul McCann, ‘Principals’ Understanding of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership’ (PhD Thesis, Australian Catholic University, 2006) 439–440.

²⁹ Howard J Eberwein III, ‘Raising Legal Literacy in Public Schools, a Call for Principal Leadership: A National Study of Secondary School Principals’ Knowledge of Public School Law’ (EdD Thesis, University of Massachusetts, 2008).

³⁰ See, eg, Education Law Association 67th Annual Conference, 20–23 October 2021, San Antonio <<https://educationlaw.org/annual-conference/conference-home>>.

³¹ Douglas Stewart, ‘Principals’ Knowledge of Law Affecting Schools’ (1996) 1(1) *Australian and New Zealand Journal of Law and Education* 111.

³² Douglas Stewart, ‘The Place of Law in the Leadership and Management of Schools’ (2005) 17(4) *Education and the Law* 127; Allison Jane Trimble, ‘Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact of Law on Tasmanian School Principals’ (PhD Thesis, University of Tasmania, 2017) 24.

should be seen as forward thinking and proactive rather than reactive; however, more often than not, the process is reactive.

As role and responsibility demands have increased, so too has the level of legislation and there is a growing body of legislation and policy in the field of public education applicable to school principals. School principals must consider numerous statutes in relation to school policies and programs, including but not limited to the NSW Department of Education's regulatory framework.³³ Examples include discrimination, negligence (civil liability), family law, labour law, freedom of information, privacy, workplace health and safety, and curriculum (New South Wales Education Standards Authority (NESA)). Government schools must follow administrative law principles;³⁴ however, as will be argued in this thesis, many school principals are not fully informed of the administrative law processes that apply to their decision-making, particularly in following the rules of procedural fairness.

The past two decades have resulted in considerable changes in the organisation of government schools with the decentralisation of education administration and the establishment of independent public schools (local schools' local decisions); consequently, there has been a significant shift in decision-making to the school level.³⁵ School principals are now in a greater position of power and they are able to make their own decisions concerning the operation of their school. This has the added effect that the principal must now understand and apply the rules of procedural fairness in their decision-making process. It has been established that many school administrators find the subject of procedural fairness challenging and daunting.³⁶ How equipped modern-day principals are in applying the rules of procedural fairness is unknown. This question is of significance in the context of risk, that is, in preventing the escalation of disputes to internal investigation (within the NSW Department of Education), external investigation (such as the ombudsman) or litigation.

³³ Ibid.

³⁴ NSW Government, Department of Education, 'Procedural Fairness in the Department of Education', *Legal Issues Bulletins and Guidelines* (Web Page) <<https://www.education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/procedural-fairness>>; *Kioa v West* (1985) 159 CLR 550, 585 ('*Kioa*'); Mark Butlin, Noeleen McNamara and Kerrie Anglin, *Law and Ethics for Australian Teachers* (Cambridge University Press, 2021) 134, 149.

³⁵ NSW Government, Department of Education, 'Local Schools, Local Decisions: A Reform from the Past', *School Success Model* (Web Page) <<https://education.nsw.gov.au/public-schools/school-success-model/school-success-model-explained/local-schools-local-decisions>>.

³⁶ Damian Bartholomew and Jason Kidd, *Being Fair: A Procedural Fairness Manual for Australian Schools* (National Children's and Youth Law Centre, 1999).

Stewart commented that the professional knowledge required to manage legal problems in schools must encompass sufficient understanding of the law for the principal to practise preventative law management strategies, which is consistent with understanding the rules of procedural fairness.³⁷ McCann further identified that natural justice is a concept public school principals must understand in relation to student suspensions and exclusions; however, principals must also understand the current legislation that applies in the decision-making process.³⁸ Newlyn identified procedural fairness in relation to student discipline; however, the processes of undertaking procedural fairness from a teacher's point of view were not discussed.³⁹ Knott identified that the concept of natural justice is well settled in relation to government schools in the application of the processes of procedural fairness surrounding suspensions and exclusion.⁴⁰ Naidoo touched on the application of procedural fairness in Auckland secondary schools and found that principals generally lacked sufficient legal literacy in administrative law.⁴¹ In the High Court case of *Kioa v West* ('*Kioa*'),⁴² it was held that the decision-maker must afford procedural fairness and that to ensure procedural fairness, the decision-maker must ensure that all the relevant material which may detrimentally affect the student be brought to their attention and given an opportunity to respond. This implies having knowledge of the principles of procedural fairness. In *CF v The State of New South Wales*,⁴³ the NSW Supreme Court took the position that procedural fairness is important in a school invoking a decision on the exclusion of students; however, any minor infraction of the rules of procedural fairness will not necessarily make the decision invalid. A student must therefore be clearly told of the allegation and have an opportunity to be heard, and the authorities must act reasonably and honestly with an open mind if the decision is likely to be upheld on the premise that the authorities did not act in an unfair manner. Failing to provide procedural fairness, as evident in this example, may lead to litigation, which could be costly. In addition, it may negatively affect the school culture and reputation, and the school's relationships with the parents. The current state of principals' understanding and application of the rules of procedural

³⁷ Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge Needed and Held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996).

³⁸ Paul McCann, 'Principals' Understanding of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006).

³⁹ David J Newlyn, 'The "Legalisation" of Education: A Study of New South Wales Teachers and their Professional Development Needs in the Area of Law' (PhD Thesis, University of Wollongong, 2006).

⁴⁰ *DM v State of New South Wales* (Supreme Court of New South Wales, Simpson J, 16 September 1997).

⁴¹ Pricilla Naidoo, 'Legal Literacy: Auckland Secondary School Principals' Knowledge of Educational Law' (MEd Thesis, Auckland University of Technology, 2018).

⁴² *Kioa v West* (1985) 159 CLR 550, 584–5.

⁴³ (2003) 58 NSWLR 135. The case is dated, and the research intends to look at recent developments in the area through doctrinal research.

fairness is unknown, and how best to improve the conceptual knowledge and understanding for school principals is investigated.

The research in education law is limited, and this thesis builds on, and adds to the existing research. The thesis extends the research to the extent that it focuses on NSW government secondary school principals knowledge on procedural fairness in their decision-making specifically in the areas of student discipline, special education, and industrial relations.

1.3 SCOPE OF THE THESIS

The scope of this thesis is limited to the rules of procedural fairness in the areas of student discipline, special education and industrial relations as applicable to NSW government secondary schools. As such, the thesis seeks to examine the application of the rules of procedural fairness by NSW government secondary school principals in their decision-making. To address this complex issue, NSW government secondary school principals, NSW Director, Educational Leadership ('DEL'), NSW Department of Education lawyers and lawyers (barristers and solicitors) who act for the NSW Department of Education were interviewed to identify the antecedents of procedural fairness problems that exist in NSW government secondary schools. The thesis is limited to one Australian jurisdiction⁴⁴ to ensure the legal problems faced by NSW government secondary school principals are adequately addressed. Notwithstanding, there is a lack of literature showing the effectiveness of school administrator legal education programs in the US⁴⁵ and no literature exists on the effectiveness of education law programs for administrators in Australia. There has been no study that has identified the effectiveness of an education law program on school principals' decision-making processes, and it is beyond the scope of this thesis to examine this. Finally, this thesis aims to develop a set of recommendations for the NSW Department of Education so they can support principals' decision-making in the areas of student discipline, special education and industrial relations that is consistent with the principles of procedural fairness.

⁴⁴ There are approximately 2,200 government schools in NSW of which approximately 400 are government secondary schools, which are serviced by a legal directorate of approximately 20 in-house lawyers: <<https://education.nsw.gov.au/about-us/our-people-and-structure/history-of-government-schools/government-schools>>. By contrast, Western Australia has approximately 800 government schools of which 102 are secondary or senior secondary (years 11 and 12 only), which are serviced by two lawyers: <<http://www.det.wa.edu.au/schoolinformation/detcms/navigation/statistical-reports/>>.

⁴⁵ Christy Lack Smith, 'A Qualitative Analysis of Arkansas Principals' Knowledge of School Law' (EdD Thesis, University of Arkansas, 2010).

1.4 RESEARCH QUESTIONS

The thesis is guided by the following primary research question:

To what extent are New South Wales government (public) secondary school principals equipped to make decisions that are consistent with the administrative law principles of procedural fairness.

In addressing the primary research question, the following sub-questions are relevant:

1. What knowledge do principals in New South Wales government (public) schools have about the rules of procedural fairness?
2. What are the rules of procedural fairness and how do they apply to principals' decision-making in relation to school discipline, special education and industrial relations?
3. Where do New South Wales government (public) secondary school principals obtain their knowledge about the rules of procedural fairness?
 - a. What do New South Wales government (public) secondary school principals think would be the most appropriate form of training on the rules of procedural fairness, and what form of training program would be best suited to equip school principals with understanding the rules of procedural fairness in the decision-making process?

1.5 RESEARCH AIMS

In considering the research questions, the aims of this research are to:

- Examine the role of school principals and the legal issues they face in the decision-making processes relating to student discipline, special education and industrial relations.
- Identify the gaps in school principals' knowledge on the application of the rules of procedural fairness.
- Develop a set of recommendations to address the gaps in school principals' understanding of the rules of procedural fairness as applicable to decision-making in the areas of student discipline, special education and industrial relations.

1.6 THEORETICAL PERSPECTIVE

This thesis is centred on the decision-making role of school principals and associated legal aspects from an education law perspective within the context of administrative law. Therefore, the key concepts that form the foundations of the thesis are ‘decision-making’, ‘education law’, ‘administrative law’, and ‘procedural fairness’.

1.6.1 *Decision-Making and the School Principal*

Decision-making affecting students, staff, parents and the wider community is one of (if not) the most important activities in which a school principal engages in. Decision-making is described as the process in which an individual selects between several alternative options to achieve a desired end state.⁴⁶ Decision-making for school principals has been described in the literature as particularly complex.⁴⁷ The decision-makers values, preference and explicit or tacit knowledge determine the process the decision-maker undertakes to make a decision.⁴⁸ Previous studies have found that personality traits and leadership styles had the greatest effect on principals decision-making.⁴⁹ However, other studies determined it was the previous experience of the principal that influenced the way they made decisions, and the level of risk they were willing to accept in making a decision.⁵⁰ Evers argued that principals’ decision-making is best learnt from past decisions and whether these decisions were sound, based on an internal or external review.⁵¹ This provides the principal with the ability to change their decision-making process for future decisions. Anderson et al outlined the five distinct steps of the decision-making process: (1) ‘defining the problem’; (2) ‘listing the alternatives’; (3) ‘determining the

⁴⁶ Stephen P Robbins, Tim Judge, Bruce Millett and Maree Boyle, *Organisational Behaviour* (Pearson Education Australia, 8th ed, 2016); Gary A Yukl, *Leadership in Organizations* (Prentice Hall, 2nd ed, 1989).

⁴⁷ Stephen H Davis, ‘The Myth of the Rational Decision Maker: A Framework for Applying and Enhancing Heuristic and Intuitive Decision Making by School Leaders’ (2004) 14(6) *Journal of School Leadership* 621, 621; Haim Shaked and Chen Schechter, ‘Exploring Systems Thinking in School Principals’ Decision-Making’ (2019) 22(5) *International Journal of Leadership in Education* 573, 575.

⁴⁸ Lee R Beach and Terry Connolly, *The Psychology of Decision Making: People in Organizations* (SAGE Publications, 2005); Jorge Walter, Franz W Kellermanns and Christoph Lechner, ‘Decision Making Within and Between Organizations: Rationality, Politics, and Alliance Performance’ (2012) 38(5) *Journal of Management* 1582.

⁴⁹ Hasan Hariri, Richard Monypenny and Murray Prideaux, ‘Leadership Styles and Decision-Making Styles in an Indonesian School Context’ (2014) 34(3) *School Leadership & Management* 284; Stacy L Mason, ‘An Inquiry into how Principals make Decisions in Secondary Schools’ (PhD Thesis, Indiana State University, 2016).

⁵⁰ Karen Trimmer, ‘Measurement and Modelling: Sequential use of Analytical Techniques in a Study of Risk-Taking in Decision-Making by School Principals’ (2016) 20(3) *Teacher Development* 398; Lori A Nixon, ‘School Leaders Decision-Making Process for Academic Program Placement: A Phenomenological Study’ (PhD Thesis, East Tennessee State University, 2017).

⁵¹ Colin Evers, ‘Decision Making as Problem-Solving Trajectories’ in Stephanie Chitpin and Colin W Evers (eds), *Decision Making in Educational Leadership: Principles, Policies, and Practices* (Routledge, 2015) 57, 57.

criteria’; (4) ‘evaluating the alternatives’; and (5) ‘selecting the alternative.’⁵² This is consistent with the view that the success of a school and educational system is derived from effective decisions, which involves a process of choices determined by the principals’ experience and training. While many decisions in a government school are made based on policy, Frick commented that the decision-making of the school principal is much more than ‘the mechanical application of existing rules, regulations and various levels of school and school-related policy’.⁵³ Principals need to consider their individual context and apply a level of discretion when decision-making as the wellbeing of students is of paramount importance in education.⁵⁴ Similarly, in their study of Western Australian government school principals, Trimmer made express mention of principals following policies, procedures and guidelines to inform their decisions; however, an issue arose when it was assumed that the policies would cater for all nuances, and that if principals deviated from the policies they risked criticism.⁵⁵ Findlay reported that principals undertake decision-making in an episodic and rushed manner with hundreds of decisions made daily,⁵⁶ which means they may not be able to dedicate the required time to afford procedural fairness. The challenge for principals is that they have two masters: the internal domain (teachers and students) and external stakeholders (school board, parents, DELs, Department of Education and the local community). These may have different and even competing views, goals, expectations and demands, which makes the task of decision-making even more complex.⁵⁷ Cunningham explained the importance of principals getting the process of decision-making correct as this models to juveniles how they perceive and express their views towards decision-makers in the long term.⁵⁸ Therefore, principals’ decision-making in

⁵² David R Anderson, Dennis J Sweeney, Thomas A Williams, Jeffrey D Camm and James J Cochran, *An Introduction to Management Science: Quantitative Approach* (Cengage, 15th ed, 2018).

⁵³ William C Frick, ‘Principals’ Value-Informed Decision Making, Intrapersonal Moral Discord, and Pathways to Resolution. The Complexities of Moral Leadership Praxis’ (2009) 47(1) *Journal of Educational Administration* 50, 50.

⁵⁴ Mario S Torres Jr and Yihsuan Chen ‘Assessing Columbine’s Impact on Students’ Fourth Amendment Case Outcomes: Implications for Administrative Discretion and Decision Making’ (2006) 90(3) *NASSP Bulletin* 185.

⁵⁵ Karen Trimmer, ‘Decision-Making by School Principals and Education Researchers: The Dilemma of Reverse Coding in Structural Equation Modeling and its Resolution in a Study of Risk-Taking Decision-Making for School Principals’ (2014) 1(1) *Athens Journal of Education* 69, 70.

⁵⁶ Nora M Findlay, ‘Discretion in Student Discipline: Insight into Elementary Principals’ Decision Making’ (2015) 51(3) *Educational Administration Quarterly* 472.

⁵⁷ Robert Ewy, *Stakeholder-Driven Strategic Planning in Education: A Practical Guide for Developing and Deploying Successful Long-Range Plans* (Quality Press, 2009); Mehmet Semih Summak and Mahmut Kalman, ‘A Q-Methodological Analysis of School Principals’ Decision-Making Strategies During the Change Process at Schools’ (2020) 10(2) *CEPS Journal* 123, 126.

⁵⁸ Christine Cunningham, ‘Decision-Making Processes and Educational Leadership in Australia’ (2014) 20(1) *Leading & Managing* 11, 11.

accordance with the rules of procedural fairness is paramount if decisions are to withstand internal and external scrutiny, and legal challenge.

1.6.2 *The Education Law Perspective*

The research problem will be explained and examined through the perspective of government secondary school principals in NSW complying with the administrative case law, legislation, policies and procedures applicable to their decision-making processes having undertaken no formal training in education law (the definition of formal training is through a higher education provider and not a seminar series such as ANZELA, LawSense, Legalwise, or in-house training). The laws impacting on the school principal provide a complex set of rights and responsibilities that empower the principal to lead and manage the school, while at the same time limit such actions in the interest of both staff and students. Education law is not a familiar term in either the legal or education fields;⁵⁹ however, Redfield gave the following explanation:

[It] includes the various sources of law (legislative, administrative and judicial as well as related secondary sources) dealing with schools Pre-K–16 and beyond. It encompasses education-specific enactments and decisions, as well as labor, tort, First Amendment, family, juvenile and civil rights law as they arise in the school context.⁶⁰

Trimble articulated that education law can be viewed from two perspectives:⁶¹ law-based, which refers to the application of an established discipline of law to the education sector; and education-focused, which is the educational system complying with the law. This thesis was from the education-focused perspective, looking at how school principals comply with the rules of procedural fairness in decision-making. Therefore, what constitutes education law is all the legal areas that impact on the school principal in the day-to-day operation of the school.⁶² For the purposes of this thesis, the legal context in which principals make decisions will be founded in three distinct areas: student discipline, special education⁶³ and industrial relations. These three areas were identified by an analysis of recent cases (see Chapter 5) and in interviews with

⁵⁹ Ralph Mawdsley and Joy Cumming, 'The Origins and Development of Education Law as a Separate Field of Law in the United States and Australia' (2008) 13(2) *Australian and New Zealand Journal of Law and Education* 7.

⁶⁰ Sarah Redfield, 'The Convergence of Education and the Law: A New Class of Educators and Lawyers' (2003) 36(3) *Indiana Law Review* 609.

⁶¹ Allison Jane Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact of Law on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017).

⁶² Examples include child welfare law, contract law, crime, cyber law, disability discrimination law, education law (*Education Act 1900* (NSW)), employment law, family law, immigration law, intellectual property, *Institute of Teaching Act 2004* (NSW), negligence, privacy, racial discrimination law, *Teaching Service Act 1980* (NSW), and transport and licensing law.

⁶³ *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

NSW Department of Education lawyers⁶⁴ as major interrelated areas of a principal's work. The aim of this thesis is to establish that, with an appropriate understanding and training in the rules of procedural fairness, school principals can be confident they are making sound legal decisions that are less likely to be challenged, and if challenged the decision would be upheld.

1.6.3 *Administrative Law Context*

Administrative law is the body of law that regulates government decision-making. Administrative law seeks to balance the interests of individuals and the collective interests represented by government to ensure that public authorities and officials act within the law.⁶⁵ The aim of administrative law is good government according to law, including ideals of 'openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality.'⁶⁶ Administrative law in the government school context refers to the accountability of principals decisions concerning individual matters (e.g. student discipline, special education and industrial relations) rather than broad policy decisions.

The doctrine of procedural fairness (natural justice), which is a subsection of administrative law, has two components: the hearing rule and the rule against bias. The requirements of these rules depend on the common law statutory interpretive principles that are applied in determining what is perceived as fair in the school context. Fairness is not only entrenched in common law duty but also in the Commonwealth Constitution, which includes the principles of neutrality and independence.⁶⁷ *South Australia v Totani*⁶⁸ is the authority on the principle that fairness is founded upon the concepts of the rule against bias and the hearing rule. This thesis is undertaken from an educational perspective looking at how educational institutions comply with the administrative law field of procedural fairness. The rules of procedural fairness are expanded and discussed in Chapter 3.

⁶⁴ Interview with Lawyer Ares, Department of Education and Communities New South Wales Legal Department, 2 December 2013. Ralph Mawdsley and Joy Cumming, 'Students' Rights and Parents' Rights: A United States Perspective of the Emergent Conflict Between Them and the Implications for Education' (2006) 10(2) *Australia and New Zealand Journal of Law and Education* 19.

⁶⁵ Robin Creyke, Matthew Groves, John McMillan and Mark Smyth, *Control of Government Action Text, Cases and Commentary* (LexisNexis Butterworths, 5th ed, 2018) 34.

⁶⁶ Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 4.

⁶⁷ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 54; *Hogan v Hinch* (2011) 243 CLR 506, 45.

⁶⁸ (2010) 242 CLR 1.

1.7 RESEARCH METHODOLOGY

The research methodology for this thesis is grounded in a basic qualitative case study, in that the researcher was investigating one educational sector (organisation) in New South Wales, Australia. Consistent with Yin,⁶⁹ the research is a critical case study as it applied a well-developed theory constructed by the researcher, that is, school principals are not generally well equipped to deal with matters in accordance with the rules of procedural fairness, and examines principals' understanding, perceptions and experiences of procedural fairness.

1.7.1 *Doctrinal Research in the Context of Education Law*

Doctrinal research is described as 'research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty, and, perhaps, predicts future developments'.⁷⁰ In the legal context of analysing documents on school policy, education legislation, the Australian Institute for Teaching and School Leadership professional framework,⁷¹ professional development programs, education law courses, legal seminars, etc, this is ascribed as 'doctrinal research in which an analysis of documents and texts seeks to quantify content in terms of predetermined categories and in a systemic and replicable manner'.⁷² Doctrinal research as with qualitative research emphasises the role of the researcher in constructing the meaning of the education law documents.⁷³

1.7.2 *Qualitative Research*

The study employed a qualitative research methodology drawing on semi-structured interviews⁷⁴ and elements of doctrinal research⁷⁵ in the analysis of cases, policy documents, professional development programs, legal seminars,⁷⁶ legislation, loose-leaf services

⁶⁹ Robert K Yin, *Case Study Research: Design and Methods* (SAGE Publications, 4th ed, 2009).

⁷⁰ Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* ('Pearce Report') (Australian Government Publishing Service, 1987) 3(17).

⁷¹ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standards for Teachers' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standards-for-teachers/standards/list>>.

⁷² Alan Bryman, *Social Research Methods* (Oxford University Press, 3rd ed, 2008) 692

⁷³ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review*, 83.

⁷⁴ Alan Bryman, *Social Research Methods* (Oxford University Press, 3rd ed, 2008).

⁷⁵ Terry Hutchinson, *Researching and Writing in Law* (Lawbook, 3rd ed, 2010).

⁷⁶ Legalwise, Legalsense and the Australian and New Zealand Education Law Association.

(Education Law Notes)⁷⁷ and other media to develop a set of recommendations for implementation by the NSW Department of Education for school principals.

There is no single definition for qualitative research; however, some of the leading authors in qualitative research design have described qualitative research in the following ways. Creswell described qualitative research as ‘an approach for exploring and understanding the meaning individuals or groups ascribe to a social or human problem’.⁷⁸ The key idea from qualitative research is that the process of research involves emerging questions and procedures to identify key themes in the research. Creswell⁷⁹ further defined qualitative research as ‘a means for exploring and understanding the meaning individuals or groups ascribe to a social or human problem by making meaning of the data through deep analysis.’ Similarly, Bryman⁸⁰ described qualitative research to be a research strategy that emphasises words rather than quantification in the collection and analysis of data. Punch⁸¹ also described qualitative research as case studies and processes, rather than variables. Finally, Merriam⁸² described qualitative research as understanding the meaning people have created using four key components: 1) the focus is on process, understanding and meaning; 2) the researcher is the primary instrument of data collection and analysis; 3) the process is inductive; and 4) the product is richly descriptive.

Consistent with Creswell’s definition of qualitative interviews,⁸³ which is a set of face-to-face interviews with participants that are generally unstructured with a few open-ended questions intended to elicit the views of the participants, this study ascribed to the following key elements of qualitative research:⁸⁴ 1) an evolving problem from the research generating a set of questions to be answered; 2) collecting data in the participants’ setting; 3) analysing the data inductively, building from particulars to general themes; and 4) interpreting meaning from the data and suggesting a set of recommendations from participant findings to understand the legal

⁷⁷ Emil Ford Lawyers, *Education Law Notes* (Web Page) <<http://www.emilford.com.au/education-schools/education-law-notes/>>.

⁷⁸ John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (SAGE Publications, 4th ed, 2013) 4.

⁷⁹ John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches (International Student Edition)* (SAGE Publications, 4th ed, 2014) 247.

⁸⁰ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012).

⁸¹ Keith Punch, *Introduction to Research Methods in Education* (SAGE Publications, 2009).

⁸² Sharan B Merriam, *Qualitative Research and Case Study Applications in Education* (Jossey Bass, 1998).

⁸³ John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches (International Student Edition)* (SAGE Publications, 4th ed, 2014) 247.

⁸⁴ Ibid.

complexities of administrative law as applicable to NSW government secondary schools using a thematic approach.

Creswell⁸⁵ outlined the distinct differences between qualitative and quantitative research as summarised in Table 1. This will be discussed further in Chapter 4.

Table 1: Comparison between qualitative and quantitative research

Qualitative	Quantitative
Inductive; generating theory	Deductive; testing theory
Interpretivism	Natural science model, in particular positivism
Constructionism	Objectivism

Qualitative research is a situated activity where the researcher collates the experiences of others in the real world; for example, the school setting.⁸⁶ This qualitative research study includes interviews, conversations, self-experiences, recordings and doctrinal research.⁸⁷ The researcher collated the data into themes and patterns that represented the real opinions of the participants to provide a set of recommendations or findings for discussion.

Consistent with Creswell’s characteristics of qualitative research,⁸⁸ this research will satisfy a number of the elements:

- Natural setting — Qualitative research involves the researcher gathering personal information (in this instance, through interviews) and insight into the administrative law problems faced by the principal in their school.
- Researcher as key instrument — The researcher will ask open-ended questions of school principals and education lawyers to satisfy whether there is a deficiency in the administrative law knowledge of school principals in their decision-making processes.
- Multiple methods — In qualitative research, the researcher undertakes many forms of data collection comprising interviews, case law, legislation, ombudsman reports, education law programs, education law seminars, etc rather than relying on one source

⁸⁵ Ibid.
⁸⁶ John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (SAGE Publications, 4th ed, 2013).
⁸⁷ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012).
⁸⁸ John W Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (SAGE Publications, 4th ed, 2013).

of data. The data sources are then analysed into themes that incorporate all of the data sources.

- Complex reasoning through inductive and deductive logic — In qualitative research, the data is consistently moving back and forward in the researchers mind along with the other researchers in the project before the themes are set. Deductive reasoning is used to ensure the themes are being constantly checked against the data.
- Participants' meanings — The aim of qualitative research is to focus on the participants' meaning of the problem rather than that of the researcher. It is important that the research represents several NSW government secondary school principals to ensure multiple perspectives of the problem are presented.
- Emergent design — The idea behind emergent design is that the structure of the problem cannot be set in stone prior to its implementation as the researcher will be required to modify the research question, interview questions and process in which they obtain information as the study progresses.
- Reflexivity — The researcher positions themselves in a qualitative research study. In this study, the key researcher has been a schoolteacher and an education lawyer; it is these experiences that identified his interest in understanding the complexities of school principals' administrative law decision-making processes.
- Holistic account — Qualitative research attempts to paint a large picture of the problem or issue under investigation. This involves reporting multiple perspectives to identify the many factors involved in research.

A deep understanding of the legal issues that principals manage in accordance with the rules of procedural fairness are best understood through semi-structured interviews, as many of the issues are either settled internally by the NSW Department of Education; settled out of court; resolved through mediation; or go unreported. If qualitative research were not undertaken, a significant amount of the data would not be reported, and the true roots of the problem would not be exposed.

1.7.2.1 Purposive Sampling Selective

Purposive sampling is a non-random form of sampling where the researcher selects potential subjects to interview with their research goals in mind.⁸⁹ It is not to be mistaken as convenient

⁸⁹ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012) 418.

sampling in which the sample is present, rather the researcher identified different schools in NSW to interview principals to satisfy the research questions. The NSW Department of Education lawyers could be ascribed as convenient sampling; however, as there are 20 in-house lawyers, the participants were selected based on their ability and willingness to participate. The lawyers external to the NSW Department of Education who represented the NSW Department of Education in litigation and/or provided legal advice were selected from their involvement with the NSW chapter of the Australian and New Zealand Education Law Association ('ANZELA').

1.7.2.2 Justification for the Number of Interviews

In basic qualitative case studies, the researcher continues until theoretical saturation has been achieved, meaning there is no minimum or maximum number of participants.⁹⁰ Mason,⁹¹ as cited in Bryman, examined the mean number of interviews in PhD thesis to be 31.⁹² Onwuegbuzier and Collins commented that 'sample sizes in qualitative research should not be so small as to make it difficult to achieve data saturation' at the same time, nor so large as to make data analysis too difficult.⁹³ Therefore, four principals and one DEL participated in the research after being contacted via their generic school email or DEL email. This is explained further in Chapter 4. The NSW Department of Education lawyers were invited to partake in the research through the Director of Legal Services, who was known to the researcher through the ANZELA network. The NSW education lawyers external to the NSW Department of Education (barristers and solicitors) were also contacted through the ANZELA network. Theoretical saturation occurs when no new or relevant data is emerging, and the interviews no longer suggest new insights into an emergent theme or new theories.⁹⁴

1.8 STRUCTURE OF THE THESIS

This thesis is organised into six chapters comprising the introduction, role and responsibilities of government secondary school principals, the legal doctrine of procedural fairness as

⁹⁰ Ibid 420.

⁹¹ Mark Mason, 'Sample Size and Saturation in PhD Studies using Qualitative Interviews' (2010) 11(3) *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research* Art 8.

⁹² Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012) 426.

⁹³ Anthony J Onwuegbuzie and Kathleen MT Collins, 'A Typology of Mixed Methods Sampling Designs in Social Science Research' (2007) 12(2) *Qualitative Report* 281, 289.

⁹⁴ Anselm L Strauss and Juliet M Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (SAGE Publications, 2nd ed, 1998) 212.

applicable to the NSW Department of Education, research design, findings and discussion, and recommendations and conclusion.

Chapter one introduced the problem on which this study is based and detailed the rationale and qualitative method for the study.

Chapter two provides a literature review on the role and functions of school principals and administrators, the importance of school-based decision-making and the application of law in the principals' day-to-day decision-making.

Chapter three discusses and analyses the administrative law doctrine of procedural fairness (the rules of natural justice) and how it applies to NSW government secondary school principals in their decision-making.

Chapter four presents and explains the research design used in this basic qualitative case study by comprehensively explaining the application of a case study design, the use of interviews and doctrinal research methodologies in the study.

Chapter five provides a presentation of the data collected by the study. The focus of this chapter is on the applicability of procedural fairness for NSW government secondary school principals in their decision-making.

Chapter six discusses the conclusion, implications and recommendations from the study.

1.9 CONTRIBUTION OF THE RESEARCH

This study is significant because it aims to provide information and analysis regarding what might constitute the principles underlying decision-making, such as procedural fairness, for NSW government secondary school principals, with implications for the development of a professional learning program. It is anticipated from preliminary interviews with school principals and NSW Department of Education lawyers that the ability of school principals to resolve issues at the school level will alleviate the workload of in-house legal counsel within the department and reduce the need for a review of decisions or litigation in the area of education law. The anticipated result will be that school principals can resolve conflicts that arise in a timely manner and avoid lengthy departmental and external investigations. It is anticipated that principals who are informed of the rules of procedural fairness will be able to confidently assume the role of chief decision-maker in their school.

No Australian study has been conducted on the laws of procedural fairness in the decision-making process with respect to legal decisions in the government school context.⁹⁵ From the findings, it is intended that a set of recommendations will be made for the development of further training in procedural fairness for school administrators to resolve legal issues at the outset. The recommendations will also map the requirements of school principals under the Australian Institute for Teaching and School Leadership professional standards⁹⁶ in providing principals with the skills to work with and understand legislative frameworks.

1.10 CONCLUSION

Chapter 1 introduced the research problem, research questions, research methodology and contribution to the area of education law research. Chapter 2 outlines the roles and responsibilities of NSW government secondary school principals.

⁹⁵ Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge Needed and Held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996); Paul McCann, 'Principals' Understanding of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006); David J Newlyn, 'The "Legalisation" of Education: A Study of New South Wales Teachers and their Professional Development Needs in the Area of Law' (PhD Thesis, University of Wollongong, 2006); Vernita Zigouras, 'Teachers with a Criminal Record: An Analysis of the Legislative Regime Governing the Registration of Victorian Teachers and Principals insofar as it deals with Convictions that come to light once a Teacher has Obtained Initial Registration' (PhD Thesis, Monash University, 2016).

⁹⁶ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

CHAPTER 2

ROLES AND RESPONSIBILITIES OF GOVERNMENT SCHOOL PRINCIPALS

2.1 INTRODUCTION

Chapter 2 provides a discussion on the roles and responsibilities of government secondary school principals in New South Wales. In identifying the professional roles and responsibilities of a school principal, the legal context of schools is discussed together with where school principals obtain their powers in the decision-making process. To ensure the relevance of the changing roles and responsibilities of NSW Department of Education principals, the discussion draws on current literature and legislation applicable to the roles and responsibilities of secondary school principals. The first part of the chapter discusses the scope of the principals' duties, roles and responsibilities and key educational outcomes. This is followed by a discussion on the legal framework schools operate within, and the need for legal training in procedural fairness.

2.2 DUTIES OF NSW GOVERNMENT SECONDARY SCHOOL PRINCIPALS

In Australia, the establishment and maintenance of primary and secondary schools is a state responsibility. In NSW schools are established under s 27 of the *Education Act 1990* (NSW) to provide education for students.⁹⁷ Government secondary school principals in NSW are appointed by the Secretary of the NSW Department of Education. The principal occupies the central position in the school and is accountable for educational leadership and management consistent with relevant state legislation, policies, procedures, guidelines and priorities of the NSW State Government. The government school principal is accountable to the following reporting chain:⁹⁸

⁹⁷ 27 Establishment of government schools

- (1) The Minister may establish a school in any locality if the Minister is satisfied that:
 - (a) sufficient children will regularly attend the school, and
 - (b) the school will comply with similar requirements to those required for the registration of non-government schools.
- (2) The Minister may name or change the name of a government school.

⁹⁸ NSW Government, Department of Education, *Department of Education Organisational Chart at 08 June 2021* <<https://education.nsw.gov.au/content/dam/main-education/about-us/our-people-and-structure/media/documents/Department-of-Education-Organisational-Chart.pdf>>.

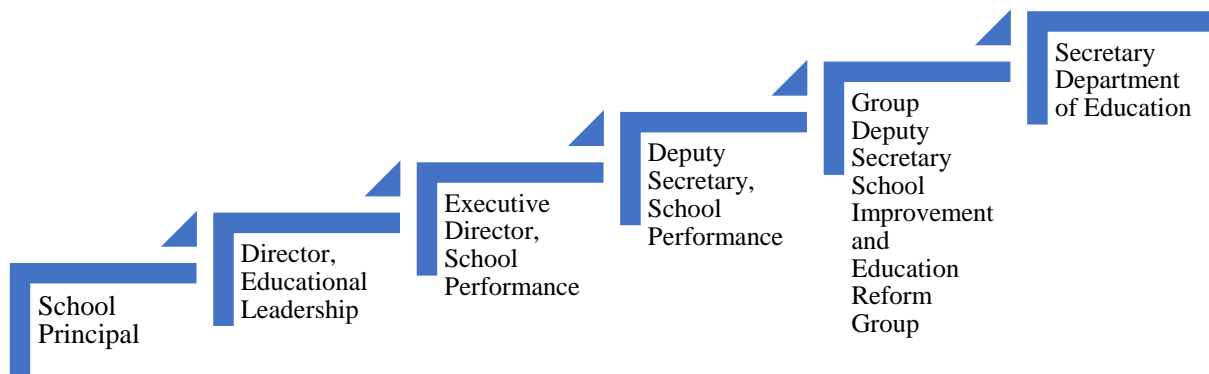


Figure 1: Internal reporting structure for school principals

The authority of the principal and responsibilities of teaching staff are derived from the Teaching Service Regulation 2017 (NSW) and the *Teaching Service Act 1980* (NSW). Section 6 of the Teaching Service Regulation 2017 articulates the general duties of those who are members of the teaching service, and s 9 outlines the requirements of those charged with managing the school. Thus, school principals must partake in all corporate interests of the school in which they are employed, and undertake such duties as assigned by the Secretary of the NSW Department of Education.⁹⁹ Broadly, these are for the efficient, proper, equitable and economic management of the school. Further obligations imposed on the school principal are for ensuring the development and implementation of policy; management of appropriate pedagogical practices for student learning; ensuring appropriate curriculum outcomes are met; coordination of all school activities; managing the continual professional development of staff (such as attendance at seminars, workshops, universities and other professional programs); financial management of the schools assets; student and staff behaviour; workplace health and safety; inclusive practices; and creating a culture where staff are encouraged to develop ideas for the continual improvement of the school community.¹⁰⁰ These core roles and responsibilities reflect the complex and broad nature of the principal's position and the links to multiple areas of law.

⁹⁹ In addition to performing the specific duties attached to the position to which the member is appointed, a member of staff:

- (a) Must participate actively in all of the corporate interests of the school, school department or establishment in which the member is employed; and
- (b) Must undertake such other duties as may be assigned to the member by the person in charge of that school or by any other person having the authority to assign duties.

¹⁰⁰ *Teaching Service Regulation 2017* (NSW) ss 6, 9.

2.2.1 *Scope of Duties*

NSW government secondary school principals' duties are governed by more than 300 policy, procedure and guideline documents published by the NSW Department of Education¹⁰¹ and the AITSL Professional Standards for Principals.¹⁰² In the policy document *Leading and Managing the School*,¹⁰³ the Department of Education dictates the key accountabilities and responsibilities for principals in the effective educational leadership and management of NSW government schools. These key accountabilities and responsibilities are broken down into seven areas.¹⁰⁴

1. Educational leadership, which help shape a culture of welfare and collaboration that provides for quality education.
2. Educational programs that meet the requirements as prescribed by the NSW Educational Standards Authority.
3. Learning outcomes that meet the learning needs of students, assessment policies, reporting student achievement, learning programs to improve student outcomes and targeting of available resources such as financial, physical, human and technological.
4. Student welfare policies that are current and include procedural fairness. The policies should promote protection, safety, self-esteem and welfare of students including practices to support students with special needs.
5. Development and management of staff in promoting a collegial and cooperative culture that encompasses effective communication, wellbeing, and decision-making processes within the school.
6. Physical and financial resource management in maintaining and executing financial management practices that meet departmental and legislative requirements.
7. School and community partnerships, which are made by providing opportunities for and promoting school community participation in developing the school's vision statement, priorities, targets and school policies.

¹⁰¹ NSW Government, Department of Education, *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library>>.

¹⁰² Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

¹⁰³ NSW Government, Department of Education, 'Leading and Managing the School', *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹⁰⁴ Ibid.

2.2.2 Roles and Responsibilities of Secondary School Principals

The roles and responsibilities of secondary school principals are complex.¹⁰⁵ There is, therefore, a need to prepare effective school leaders for the complex roles and responsibilities of the school principalship, which is documented in the literature.¹⁰⁶ The role of the school principal has become more complex since the 1980s,¹⁰⁷ and Fullan captured the principals' frustration with the complexity:

With the move toward the self-management of schools, the principal appears to have the worst of both worlds. The old world is still around with expectations to run a smooth school, and to be responsive to all; simultaneously the new world rains down on schools with disconnected demands, expecting that at the end of the day the school should constantly be showing better test results, and ideally become a learning organisation.¹⁰⁸

Lashway¹⁰⁹ summarised the historical position of accountability of school principals as performing sound pedagogical practices; maintaining strong cohesion amongst the teaching staff; being an outstanding educational instructor; and managing a budget. The expectations and demands on the school principal have never been more convoluted,¹¹⁰ evolving with the fast paced expectations of the government education system within our society. Principals are required not only required to implement decisions made by central office¹¹¹ but also to undertake the difficult task of decision-making. Multiple authors have reported that beginning school principals perceive their roles as complex, especially when dealing with decision-making.¹¹² Davis¹¹³ reported that principals' activities involve being educational visionaries, managers, pedagogical leaders, decision-makers, programmers, accountability reporters and

¹⁰⁵ Van E Cooley and Jianping Shen, 'School Accountability and Professional Job Responsibilities: A Perspective from Secondary Principals' (2003) 87(634) *NASSP bulletin* 10.

¹⁰⁶ Helen Wildy and Simon Clarke, 'Principals on L-Plates: Rear View Mirror Reflections' (2008) 46(6) *Journal of Educational Administration* 727.

¹⁰⁷ Michael A Copland, 'The Myth of the Superprincipal' (2001) 82(7) *Phi Delta Kappan* 528.

¹⁰⁸ Michael Fullan, *The New Meaning of Educational Change* (Routledge, 3rd ed, 2001) 138.

¹⁰⁹ Larry Lashway, 'Who's in Charge? The Accountability Challenge' (2000) 1(3) *Principal Leadership* 8.

¹¹⁰ Neil Dempster, Mark Freakley and Lindsay Parry, 'The Ethical Climate of Public Schooling Under New Public Management' (2001) 4(1) *International Journal of Leadership in Education* 1.

¹¹¹ Phillip McKenzie, Bill Mulford and Michelle Anderson, 'School Leadership and Learning: An Australian Overview' (Conference Paper, Australian Council for Educational Research Conference, The Leadership Challenge: Improving Learning in Schools, 12–14 August 2007).

¹¹² Simon Clarke and Helen Widly, 'Context Counts: Viewing Small School Leadership from the Inside Out' (2004) 42(5) *Journal of Educational Administration* 555; Simon Clarke, Helen Wildy and Coral Pepper, 'Connecting Preparation with Reality: Primary Principals' Experiences of Their First Year Out in Western Australia' (2007) 13(1) *Leading and Managing* 81; Chris Day, Alma Harris and Mark Hadfield, 'Grounding Knowledge of Schools in Stakeholder Realities: A Multi-Perspective Study of Effective School Leaders' (2001) 21(1) *School Leadership & Management* 19; Jim O'Brien, Daniel Murphy and Janet Draper, *School Leadership. Policy and Practice in Education No. 9* (Dunedin Academic Press, 2003).

¹¹³ Stephen Davis, Linda Darling-Hammond, Michelle LaPointe and Debra Meyerson, *School Leadership Study: Developing Successful Principals* (Stanford University, Stanford Educational Leadership Institute, 2005).

community builders and that they must deal with the multiple crises and special situations present in schools. In addition, principals are to be ‘expert overseers of legal, contractual, and policy mandates and initiatives’.¹¹⁴ Copeland¹¹⁵ argued that the ‘myth of the superprincipal’ created an unrealistic level of expectation for the role, which made it difficult for principals to maintain a work-life balance. The role of the government school principal is becoming superhuman, with the view that the job requirements far exceed the reasonable capacities of any one person. Schiff¹¹⁶ found that on average, principals worked 62 hours a week, with less than one-third of that time spent on curriculum and instructional activities. The Deloitte Principal Workload and Time Use Study (‘Deloitte study’) found that 64% of principals reported that achieving their workload was difficult, and 11% reported that the workload was not achievable at all.¹¹⁷ This would be consistent with the time-consuming nature of conducting an investigation and making a decision in accordance with procedural fairness, as managing complaints is a labour intensive and time-consuming process in terms of resources and emotional exhaustion for all parties.

Over the past 10 years the NSW Department of Education pursued policies to restructure its once highly centralised bureaucratic government educational authorities, which resulted in greater autonomy for the school principal.¹¹⁸ With the decentralisation of government educational systems and a shift towards greater autonomy, the efficiency, accountability, finance management and staffing requirements have placed greater demands on the school principal,¹¹⁹ particularly in the decision-making process. Karmel proposed that:

Responsibility should be devolved as far as possible upon the people involved in the actual task of schooling, in consultation with the parents of the pupils they teach ... Responsibility will be most effectively discharged where people entrusted with making decisions are also the people responsible for carrying them out, with an obligation to justify them.¹²⁰

¹¹⁴ Ibid.

¹¹⁵ Michael A Copland, ‘The Myth of the Superprincipal’ (2001) 82(7) *Phi Delta Kappan* 528.

¹¹⁶ Tamara Schiff, ‘Principals’ Readiness for Reform: A Comprehensive Approach’ (2002) 2(5) *Principal Leadership* 21.

¹¹⁷ Deloitte, *Principal Workload and Time Use Study* (Report, NSW Government, September 2017) <<https://education.nsw.gov.au/content/dam/main-education/gef/media/documents/Principal-workload-and-time-use-study-Nov-2017.pdf>>.

¹¹⁸ NSW Government, Centre for Education Statistics and Evaluation, *Local Schools, Local Decisions Evaluation Final Report* (Web Page) <<https://www.cese.nsw.gov.au/publications-filter/local-schools-local-decisions>>.

¹¹⁹ Helen Wildy, Simon Clarke, Irene Styles and Kadir Beycioglu, ‘Preparing Novice Principals in Australia and Turkey: How Similar Are Their Needs?’ (2010) 22 *Educational Assessment Evaluation & Accountability* 307.

¹²⁰ Peter H Karmel, *Schools in Australia* (Report of the Interim Committee of the Australian School’s Commission, Australian Government, Canberra, May 1973) 10.

The scope of a school principals' duties must be clearly defined if a person is to know what is expected in their day-to-day duties. The role of the school principal is to manage and lead the planning, delivery, evaluation and improvement of education to all students in the school through strategic decision-making provided by the NSW Department of Education. School principals undertake their work in complex environments, which are reflected in the selection criteria for such appointments as published by the NSW Department of Education.¹²¹ The core accountabilities and duties of NSW government secondary school principals are derived from *Leading and Managing the School*¹²² policy documents, which are publicly available from the NSW Department of Education, and the Australian Institution of Teaching and School Leadership Ltd ('AITSL') standards for school leaders.¹²³ As such, to undertake these tasks efficiently and effectively, school principals need some understanding of the rules of procedural fairness. The Deloitte study reported that principals adopted the AITSL principal standards to provide clarity around what their role is and the outcomes they should be focused on achieving.¹²⁴ Principals also reported that 40% of their time was spent in leadership and management tasks; however, the study was limited in that it investigated only four secondary school principals. The total size of the study represented only 5% (119 schools) of the NSW Department of Education school principals. Finally, principals commented that there is no clear job description or profile to identify what a successful principal is required to achieve.¹²⁵ The roles and responsibilities of NSW Department of Education school principals are discussed further below.

2.2.3 Personal and Professional Attributes of School Principals

The personal qualities and social and interpersonal skills of emotional intelligence, empathy, resilience and personal management are key attributes a principal must exhibit to manage the

¹²¹ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014)

<https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹²² NSW Government, Department of Education, 'Leading and Managing the School', *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹²³ Australian Institution of Teaching and School Leadership Ltd, 'Unpack the Principal Standard' (Web Page) <<https://www.aitsl.edu.au/lead-develop/understand-the-principal-standard/unpack-the-principal-standard>>.

¹²⁴ Deloitte, *Principal Workload and Time Use Study* (Report, NSW Government, September 2017) 26 <<https://education.nsw.gov.au/content/dam/main-education/gef/media/documents/Principal-workload-and-time-use-study-Nov-2017.pdf>>.

¹²⁵ Ibid 46.

school effectively and efficiently.¹²⁶ Hassain et al¹²⁷ found that the four most significant attributes displayed by school principals were that they had high standards, were courageous, emotionally intelligent and proactive. The perception is therefore that a school principal is a rational leader capable of making decisions in a calm and systematic manner. Principals are expected to exhibit ethical leadership that is based on the concepts of respect, dignity and a commitment to education for all students.¹²⁸ Similarly, principals are expected to have polished alternative dispute resolution skills such as negotiation, mediation and conciliation to deliver positive outcomes for the school community.¹²⁹ Furthermore, principals are also expected to develop and mentor junior staff such as deputy principals and head teachers in these skills. In communicating to the wider school community, particularly on student outcomes, principals are expected to use a variety of modern media.¹³⁰ Thus there is a view that the principal should be a contextualised decision-maker who considers the social, political and local circumstances when making decisions. The principal needs to build trust and confidence within the broader educational community to ensure the educational objectives are achieved.¹³¹ This may be further achieved by developing effective relationships via an extensive ability to communicate, inspire, motivate and drive the direction of the school.¹³² Similarly, principals should be self-reflective practitioners who modify their leadership and management style to suit individual circumstances, including those of a sensitive nature, to ensure all members of the school community are catered for in an inclusive manner.¹³³ Finally, these personal and professional attributes are consistent with some of the elements of the hearing rule, as discussed in Chapter 3, in that the decision-maker should be sensitive to the issues at hand.

¹²⁶ NSW Government, Department of Education, 'Leading and Managing the School', *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹²⁷ Muhammad Athar Hussain, Haider Syed Zubair, Ahmed Imtiaz and Ali Shoukat, 'School Principals as Effective Change Agents: A Study of Essential Skills and Attributes' (2016) 19(2) *Journal of Educational Research* 49.

¹²⁸ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 14 <https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹²⁹ Tryon Francis, 'Principals, Alternative Dispute Resolution, and Procedural Fairness in Australian Public Schools' (2020) 23 *International Journal of Law and Education* 85; NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 14 <https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹³⁰ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 14 <https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

2.2.4 Educational Leadership

A critical determinant of success of the educational institution is the quality of its principal.¹³⁴ Principals lead the vision of the school through a set direction from the NSW Department of Education and societal values in education. Principals lead and manage the whole school planning process through critical analysis to ensure compliance with the NSW Department of Education policies, procedures and legislative requirements.¹³⁵ The principal is instrumental in the development of an educational environment that promotes fairness, ethical practice, democratic values and lifelong learning.¹³⁶ The principal should instil high standards across teachers, students, parents and the wider community by promoting the ethos, traditions and positive culture of education.¹³⁷ Principals promote lifelong learning; inspire and motivate students to develop high standards towards education; and uphold the highest levels of integrity and ethical perspectives in relation to education.¹³⁸ The principal is responsible for the quality of education and the welfare of their students through the implementation of the policies, procedures and guidelines set out by the NSW Department of Education.¹³⁹ The principal must be an educational expert across all learning areas of the curriculum, as dictated by the New South Wales Educational Standards Authority ('NESA'). In leading the school, the principal must ensure the teaching standards and learning practices are consistent with current research, literature and policies.¹⁴⁰ The principal develops the annual school plan which is then embedded into the schools' practices and must be consistent with policy and legislation.¹⁴¹ Strategic planning activities led by the principal are reviewed regularly.¹⁴² The principal should collaborate with the wider school community to create an environment that is conducive to learning and where the shared goals can be validated.¹⁴³ In leading and managing in the

¹³⁴ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) 8 <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

¹³⁵ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 12 <https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹³⁶ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ NSW Government, Department of Education, 'Leading and Managing the School', *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹⁴⁰ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

¹⁴¹ NSW Government, Department of Education, 'Leading and Managing the School', *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹⁴² Ibid.

¹⁴³ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

educational context, the principal is able to make decisions that produce positive solutions to complex problems.¹⁴⁴ As part of the educational leadership criterion, the principal should take an unbiased approach (the rule against bias, which is discussed in Chapter 3) in any decision that affects an individual, be it a student, parent or member of staff.

2.2.5 Educational Programs

The principal is ultimately responsible for the quality of teaching and learning in the school. The principal will be the expert at the school on relevant national policies, legislation (local, state and federal as applicable to educational institutions), agreements and policies. In applying their knowledge of current developments in educational policy, principals aim to improve the educational opportunities and outcomes in schools.¹⁴⁵ They apply relevant legislative and policy requirements in relation to serving their community, particularly in the areas of child safety, health and wellbeing, industrial relations, financial management and accountability.¹⁴⁶ The principal is accountable for implementing the curriculum as defined by governing authorities such as NESA and for meeting all of the educational needs of student subgroups such as special needs students, gifted and talented students, English as an additional language or dialect ('EAL/D') students, Aboriginal students, etc.¹⁴⁷ Furthermore, the ultimate responsibility to provide for the differentiated instruction to meet the individual needs of students' rests with the principal. The principal oversees the continuing professional development of the teaching staff through the implementation of sequenced teaching and learning programs (units of work/learning) that meet the contextual needs of students.¹⁴⁸ In providing a lead teaching and learning culture, the principal fosters an environment that promotes teaching and learning to develop enthusiastic independent lifelong learners.¹⁴⁹ The principal creates an environment in which all members of the school community can contribute actively to the decisions being made.¹⁵⁰ Principals do not work in isolation and are expected to work collaboratively with other schools to foster learning communities between schools to

¹⁴⁴ NSW Government, Department of Education, 'Leading and Managing the School', *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹⁴⁵ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

¹⁴⁶ Ibid.

¹⁴⁷ NSW Government, Department of Education, 'Leading and Managing the School', *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹⁴⁸ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

promote public education.¹⁵¹ Finally, educational programs must be evaluated for their effectiveness, and the assessment and reporting of student educational outcomes (moderation) and national testing programs such as National Assessment Program – Literacy and Numeracy (‘NAPLAN’) and High School Certificate (‘HSC’) must also be evaluated.

2.2.6 Learning Outcomes

Continual improvement on teaching and learning is a key aspect of a principal’s role. An inclusive educational environment is mandated by legislation,¹⁵² which means the principal must provide opportunities for all students to maximise their learning outcomes. Principals must strategically analyse the areas of development within the curriculum that would enhance students’ opportunities to achieve learning outcomes, also noting the competing interests that apply.¹⁵³ Principals apply outstanding educational leadership through knowledge and understanding for the improvement of educational outcomes in their schools.¹⁵⁴ They understand and apply the latest research developments in the areas of leadership, curriculum, assessment and reporting, and student welfare to improve students’ educational outcomes.¹⁵⁵ The school must develop an assessment policy consistent with NESA requirements; this must be evaluated regularly.¹⁵⁶ The reporting of student achievement to the school community and educational stakeholders is overseen by the principal.¹⁵⁷ The principal must be able to interpret the relevant data with a view to improving learning programs and student achievement.¹⁵⁸ To support quality learning and educational programs, the principal must manage the financial wellbeing of the school, physical infrastructure (such as science laboratories, swimming pools, auditoriums), professional staff (including contractors) and relevant technologies for pedagogical purposes, while being mindful of their legal responsibilities and any potential liabilities.¹⁵⁹ Secondary principals also need to lead ‘the planning, development and

¹⁵¹ NSW Government, Department of Education, ‘Leading and Managing the School’, *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹⁵² *Disability Discrimination Act 1992* (Cth); *Anti-Discrimination Act 1977* (NSW).

¹⁵³ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 13 <https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹⁵⁴ Australian Institute for Teaching and School Leadership Ltd, ‘Australian Professional Standard for Principals’ (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

¹⁵⁵ *Ibid.*

¹⁵⁶ NSW Government, Department of Education, ‘Leading and Managing the School’, *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹⁵⁷ Australian Institute for Teaching and School Leadership Ltd, ‘Australian Professional Standard for Principals’ (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

¹⁵⁸ *Ibid.*

¹⁵⁹ NSW Government, Department of Education, ‘Leading and Managing the School’, *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

implementation strategies aimed at addressing specific academic, vocational and welfare needs of students working towards a Record of School Achievement of undertaking the Higher School Certificate ... based on evidence gathered from a range of available data sources and the compliance requirements of [NESA] and the Department [of Education]’.¹⁶⁰

2.2.7 Student Wellbeing

When providing for the wellbeing of students, principals must ensure that individual learning and developmental needs of students are being met.¹⁶¹ These include individualised education programs for those students most at risk based on the principles of equity and diversity.¹⁶² The principal is accountable for developing and implementing a student welfare and discipline policy that promotes the protection, safety, self-esteem and welfare of students.¹⁶³ This should be reviewed on an annual basis and must include the principles of procedural fairness as per the *Student Discipline in Government Schools Policy*,¹⁶⁴ *Legal Issues Bulletin 3 Procedural Fairness in The Department of Education*¹⁶⁵ and *Legal Issues Bulletin 5 Student Discipline in Government Schools*.¹⁶⁶ The policy must discuss the ways in which students with special educational requirements are catered for in the school environment. In disputes around student welfare, the principal needs to work with the relevant support staff in providing a safe, responsive and harmonious environment to enhance student outcomes.¹⁶⁷ Principals need to provide effective leadership, particularly in those areas relating to child protection and student welfare, to ensure a safe and supportive learning environment that maximises student success.¹⁶⁸ In providing professional development for staff, the mandatory topics are in the

¹⁶⁰ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 13
<https://teach.nsw.edu.au/data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ NSW Government, Department of Education, ‘Leading and Managing the School’, *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹⁶⁴ NSW Government, Department of Education, ‘Student Discipline in Government School Policy’, *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library/policies/student-discipline-in-government-schools-policy>>.

¹⁶⁵ NSW Government, Department of Education, ‘Procedural Fairness in the Department of Education’, *Legal Issues Bulletins and Guidelines* (Web Page) <<https://www.education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/procedural-fairness>>.

¹⁶⁶ NSW Government, Department of Education, ‘Student Discipline in Government Schools, Legal Issues Bulletin 5’, *Legal Issues Bulletins and Guidelines* (Web Page) <<https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/bulletin-5-student-discipline-in-government-schools>>.

¹⁶⁷ NSW Government, Department of Education, ‘Leading and Managing the School’, *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹⁶⁸ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014)
<https://teach.nsw.edu.au/data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>
13.

effective implementation of student welfare and discipline, in particular the application of child protection legislation, which is articulated on the Child Protection Training¹⁶⁹ website and in Legal Issues Bulletin 59 *Duty to Report and Duty to Protect a Child from Child Abuse*.¹⁷⁰ Principals must have detailed knowledge of the NSW Department of Education Aboriginal education policies.¹⁷¹ As part of policy knowledge and application, principals need to be able to demonstrate effective partnerships between the school and the Indigenous communities which they serve in the increased attendance and retention of Aboriginal students.¹⁷² This includes the provision of staff professional learning and strategies to increase Aboriginal student learning outcomes.¹⁷³ Finally, as per the NESA syllabus outcomes, all students should be provided with the opportunity to develop a deeper understanding of Aboriginal histories, cultures and languages.

2.2.8 *Staff Welfare, Development and Management*

The principal must effectively manage underperforming teachers with the assistance of the Employee Performance and Conduct Directorate ('EPAC') and identify and develop promising staff for future leadership positions. In developing themselves and others, the principal always treats people fairly and with respect.¹⁷⁴ To maintain currency in their ever-developing role, the principal must continually engage with professional learning opportunities to further develop the school's outcomes.¹⁷⁵ In providing leadership within the school, the principal promotes a collegial and cooperative environment that supports the professional development of all staff.¹⁷⁶ This is achieved by ensuring effective communication;¹⁷⁷ ensuring fairness in decision-making processes; and informing and educating staff of their individual obligations to adhere to the

¹⁶⁹ NSW Government, Department of Education, 'Child Protection Training', *Child Protection* (Web Page) <<https://education.nsw.gov.au/student-wellbeing/child-protection/child-protection-training>>.

¹⁷⁰ NSW Government, Department of Education, 'Duty to Report and Duty to Protect a Child from Child Abuse', *Legal Issues Bulletins and Guidelines* (Web Page) <<https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/bulletin-59-duty-to-report-and-duty-to-protect-a-child-from-child-abuse>>.

¹⁷¹ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 18 <https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

¹⁷⁵ Ibid.

¹⁷⁶ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 16 <https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹⁷⁷ Heather E Price, 'Principals' Social Interactions with Teachers: How Principal-Teacher Social Relations Correlate with Teachers' Perceptions of Student Engagement' (2015) 53(1) *Journal of Educational Administration* 116.

relevant legislation and the NSW Department of Education policies, guidelines and Code of Conduct. Staff should have access to professional skill development in the areas of student welfare, assessment, curriculum, planning, classroom management, leadership and pedagogical practices, to name just a few. This includes identifying staff who are underperforming in any of the AITSL standards¹⁷⁸ and then providing the opportunity for those staff members to develop and improve. As an expert in education, the principal is ultimately responsible for ensuring that appropriate teaching strategies consistent with current research are implemented in the school, and that the relevant curriculum is being addressed as defined by governing bodies such as NESA and the Australian Curriculum, Assessment and Reporting Authority ('ACARA').¹⁷⁹ In consultation with the NSW Department of Education policies and guidelines, the principal ensures that staff are aware of their duties, including delegated duties from the school leadership team.¹⁸⁰ In ensuring compliance for documentation that may be requested under Freedom of Information,¹⁸¹ with a subpoena¹⁸² or by other means, the principal is responsible for ensuring that relevant documentation and records management systems are implemented and reviewed within the school. The principal must make strategic decisions of when to delegate tasks to members of staff and develop a reporting accountability tool to ensure the completion of the task.¹⁸³ Finally, principals must ensure that all staff undertake an induction process that advises staff of their legal, legislative, policy and mandatory training requirements.

2.2.9 Physical and Financial Resource Management

The principal must understand and apply the complex financial practices that meet the NSW Department of Education's legislative and policy requirements such as the school's annual budget and financial statements, plus any development proposals regarding the maintenance

¹⁷⁸ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standards for Teachers' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standards-for-teachers/standards/list>>.

¹⁷⁹ Ibid.

¹⁸⁰ NSW Government, Department of Education, 'Leading and Managing the School', *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

¹⁸¹ NSW Government, Department of Education, 'Information Requests from other Government Agencies, Legal Issues Bulletin 47', *Legal Issues Bulletins and Guidelines* (Web Page) <<https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/bulletin-47-requests-for-information-from-other-government-agencies>>; NSW Government, Department of Education, 'Exchanging Information with other Organisations: The Care and Protection Act, Legal Issues Bulletin 50', *Legal Issues Bulletins and Guidelines* (Web Page) <<https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/information-provided-for-the-welfare-of-children>>.

¹⁸² NSW Government, Department of Education, 'Subpoenas', *Legal Issues Bulletins and Guidelines* <<https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/bulletin-25-subpoenas>>.

¹⁸³ NSW Government, Department of Education, 'Leading and Managing the School', *Policy Library* (Web Page) <<https://education.nsw.gov.au/policy-library/policies/leading-and-managing-the-school>>.

and establishment of buildings, with a view to ensure that funds are maximised within the school and relevant records are maintained for the financial audit of the school.¹⁸⁴ Principals are tasked with the strategic management of the schools staffing allocation budget to deliver quality educational provisions, meaning principals need to decide where the human resource budget is best spent.¹⁸⁵ Similarly, effective maintenance and development of the physical environment that ensures a safe and inclusive educational setting conducive to learning must be considered by principals.¹⁸⁶

Additionally, under workplace health and safety ('WHS') legislation,¹⁸⁷ the principal is the worksite manager and must ensure compliance with the NSW Department of Education WHS requirements.¹⁸⁸ Principals must be effective at: 'Managing risk and maintaining the legislative requirements of work health and safety at the school level to ensure that the school is a safe place for staff to work and that students are protected from risk of harm.'¹⁸⁹ Finally, principals are now tasked with ensuring students are digitally literate, which involves the safe management, including online bullying mitigation strategies, and implementation of multiple technologies for the efficient delivery of education.¹⁹⁰ This further extends to the provision of a quality digital environment that integrates a whole school approach (curriculum, school management, financial accounts, etc) where parents and staff can actively engage with information.¹⁹¹

2.2.10 School and Community Partnerships

Principals are required to have a high level of engagement in working with the community. This includes ensuring that the multicultural nature of Australia is developed in schools, engaging

¹⁸⁴ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 17
<https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Regulations 2017* (NSW).

¹⁸⁸ NSW Government, Department of Education, 'Work Health and Safety (WHS) Policy', *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library/policies/work-health-and-safety-whs-policy>>.

¹⁸⁹ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 17
<https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹⁹⁰ Caitlin Chalmers, Marilyn Anne Campbell, Barbara A Spears, Des Butler, Donna Cross, Phillip Slee and Sally Kift, 'School Policies on Bullying and Cyberbullying: Perspectives Across Three Australian States' (2016) 58(1) *Educational Research* 91.

¹⁹¹ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 17
<https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

with Indigenous cultures,¹⁹² and developing positive partnerships with students, families and the wider community. Through community engagement, the principal is able to create an environment in which the welfare of students is promoted through a strong educational ethos encompassing spiritual, moral, social, ethical and physical health.¹⁹³ The principal engages with multiple stakeholders in the community such as school boards, governing bodies, teachers, unions, parents and students.¹⁹⁴ Education is no longer undertaken in a silo, as such, the principal must take an active stance in providing opportunities to the broader school community (parents, school boards, students, professional government agencies, businesses, industry, etc) in the involvement of vision statements, educational priorities, school targets and school policies.¹⁹⁵ As the educational context changes with societal expectations, the principal must lead improvement, innovation and changes within the school community based on valid research.¹⁹⁶ The vision and strategic plan of the school is implemented, and appropriate analysis of its success is reported at key milestones.¹⁹⁷ The principal undertakes the pivotal role of ensuring that all members of the school community are actively involved in the communication of the decision-making process. The parent body of the school plays an important role in the school and as such, the principal must facilitate and support its operation.¹⁹⁸ Principals provide innovative approaches using Information Communication Technology ('ICT') to cater for the changing nature of the way students, staff and parents learn and engage with technology.¹⁹⁹ One of the most important duties of the school principal is the promotion of government education and training to the local community and affording procedural fairness in decisions that affect individuals (procedural fairness is discussed in Chapter 3).

¹⁹² James A Smith, Steve Larkin, Dean Yibarbuk and John Guenther, 'What do we Know About Community Engagement in Indigenous Education Contexts and How Might This Impact on Pathways into Higher Education?' in Jack Frawley, Steve Larkin and James A Smith (eds), *Indigenous Pathways, Transitions and Participation in Higher Education* (Springer, 2017) 31.

¹⁹³ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

¹⁹⁴ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 14 <https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹⁹⁵ Ibid.

¹⁹⁶ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standard-for-principals>>.

¹⁹⁷ NSW Government, Department of Education & Communities, *Executive and Principal Positions: A Guide for Addressing the General Selection Criteria* (July 2014) 14 <https://teach.nsw.edu.au/_data/assets/pdf_file/0010/55666/guide-to-application-writing-for-exec-staff.pdf>.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid 13.

2.2.11 *Principal as Decision-Maker*

A decision-maker is defined as an officer who is working within a government department (in this instance, the NSW Department of Education) who is authorised to make decisions on behalf of those ministers or determinations made under legislation. The powers of decision-making for school principals in education comes from the *Education Act 1900* (NSW). Depending on the situation (student behaviour, special education or industrial relations), the principal may have discretion in their decision. In some instances, the school principal will be required to make a particular decision consistent with NSW Department of Education legislation, policy and guidelines, which is particularly relevant when administrative decisions in education are made that are directed towards an individual or group of individuals. Decision-makers (school principals) must ensure that they have the jurisdiction to make the decision, otherwise their decision could be found to be ultra vires. The principal must make sure that the decision they are going to make will withstand external review on the pillar of jurisdiction. Decision-makers generally want to make the right decision every time; however, errors will occur because not all decision-making duties take place in ideal circumstances.²⁰⁰ Even when due care has been taken when making a decision, affected individuals can be aggrieved and challenge the decision. When making a decision, the principal must act fairly by providing an opportunity for the affected person to be heard and for the decision to be free from bias. A fair hearing is characterised by providing the affected person with an opportunity to respond to all issues or facts that have arisen as part of the investigation and decision-making process. The elements of procedural fairness (bias and hearing rule) will be discussed further in Chapter 3. School principals must be seen to make decisions that are free from bias. As the chief decision-maker in schools, this can be challenging for school principals as over time they may have developed a bias towards members in the school community. Government school principals' decisions are not free from the rules of procedural fairness. Prior to making a decision, a school principal needs to satisfy any legislative and policy requirements. School principals must therefore be knowledgeable about legislation and policy as applicable to government education. When exercising discretion in decisions, the principal must consider any relevant matters the legislation requires; this includes the rights of the child and human rights legislation. When exercising discretion, the school principal must not consider anything the legislation forbids the principal from considering. Decisions should be based on persuasive evidence that the principal

²⁰⁰ Australian Government, Department of Defence, 'Good Decision-Making in Defence: A Guide for Decision-makers and those who Brief Them' (Web Page) <[Good Decision-Making in Defence: A guide for decision makers and those who brief them](#)>.

has obtained fairly. Principals undertaking the task of decision-making must consider whether the evidence presented is consistent or inconsistent with the known facts. The majority of the decisions government school principals undertake will be governed by the NSW Department of Education policy documents. If any of these documents are going to affect the person, these policies should be provided to the affected person so they can access and respond to the policy accordingly. The NSW Department of Education makes policy documents publicly available via their online policy library.²⁰¹ Policies must be applied to consider the individual circumstances of the matter. If the policies are not followed, an internal review by the NSW Department of Education, a tribunal or court could rule a decision invalid. The school principal must maintain a full record of the decision when informing the affected person, and it must be made in a time frame as outlined by the policy documents. When informing the affected person, it is imperative the school principal outline any internal or external review rights the affected person is entitled to.²⁰² The decision-making process applying the rules of procedural fairness are further elaborated and discussed in reference to the government educational context in Chapter 3.

2.3 LEGAL CONTEXT OF SCHOOLS

School principals work in complex environments where they are required to make multiple decisions every day, some of which require an understanding of the law. NSW government secondary school principals derive their legal powers from the *Education Act 1900* (NSW) and they are employed under the *Teaching Service Act 1980* (NSW).

Legislation in the area of education law is expanding and is explained as follows:²⁰³

Educational decision making and practices ... being challenged by those who feel disaffected or disadvantaged by the education system, it is the law that is increasingly providing both the grounds upon which such challenges can be made and the remedies many complainants seek.

Court decisions have bound the school in the following way to ensure consistency and compliance amongst schools and school districts:

²⁰¹ NSW Government, Department of Education, *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library>>.

²⁰² NSW Government, Department of Education & Communities, 'Suspension and Expulsion of School Students: Procedures 2011' (Web Page) <https://policies.education.nsw.gov.au/policy-library/associated-documents/suspol_07.pdf>.

²⁰³ Peter Williams, 'Education Negligence: An Australian Perspective' (Working Paper Series 95, School of Business Law, Curtin University, October 1995) 10.

Judicial enforcement of these laws has subjected school teachers, administrators and board members to new concerns about interpretations of state and federal laws, mandates for meaningful and effective compliance under those laws, exposure to compensatory liability, and the vagaries of governmental immunity.²⁰⁴

The *Staff in Australia's Schools 2013: Main Report on the Survey*²⁰⁵ questioned secondary schoolteachers intending to apply for leadership positions in the next three years and it found that the percentage of teachers who felt they were 'well to very well prepared' in the following accountability areas was 88% in managing people, 57.5% in school accountability requirements, and 76.2% in conflict resolution. However, when principals were asked to rate the preparation of recent Bachelor of Education (Secondary) graduates in complying with legislative and organisational requirements, they rated the novice teachers as being 'well to very well prepared' at 50.5%.²⁰⁶ To address the legal knowledge aspects of a successfully compliant school in procedural fairness, it would be beneficial if school administrators completed an introductory course on education law as applicable to educational institutions.²⁰⁷ This thesis presents the argument that NSW government secondary school principals require an understanding the rules of procedural fairness to perform sound government decision-making.

If government secondary school principals are to undertake administrative action as empowered by legislation and policy, then it is essential they understand their obligations:

The school system operates within a dense legal, political, and social environment. It is subject to municipal, state and federal laws and regulations. As a professionally oriented organisation, it is influenced by professional educators, ideologies, licencing requirements, employment laws, and so forth. Nevertheless, within these constraints and influences, there is room to manoeuvre, to develop and modify styles and patters of operations, to create and emphasize certain programs.²⁰⁸

And Findlay commented that principals appeared to interpret discretion in decision-making in the following way:

²⁰⁴ Ralph Mawdsley and Joy Cumming, 'The Origins and Development of Education Law as a Separate Field of Law in the United States and Australia' (2008) 13(2) *Australian and New Zealand Journal of Law and Education* 7.

²⁰⁵ Phillip McKenzie, Paul R Weldon, Glenn Rowley, Martin Murphy and Julie McMillan, *Staff in Australia's Schools 2013: Main Report on the Survey* (ACER, 2014).

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Joel F Handler, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (SAGE Publications, 1986).

Judgelike, they would collect information, make decisions, and assign consequences all within the broadly defined authority delegated to them through statute; moreover, discretion appeared to be exercised at all stages of their decision-making process.²⁰⁹

2.3.1 *Need for Legal Literacy of Principals*

To manage the legal matters that emerge in the course of each school day, principals, need some knowledge of the law.²¹⁰ Arguments have been raised that a principal's knowledge of legal issues, legislation, policy documents and legal decision-making processes are essential for the provision of a successfully compliant school.²¹¹ It has been suggested that school principals need some understanding of the concepts associated with leadership, management and administration to manage their schools effectively.²¹² Similarly, pre-principalship programs addressing preventative legal risk management strategies, and an awareness of the law have previously been lacking.²¹³ It is unknown whether school principals have a lack of understanding dealing with issues in line with the rules of social justice and procedural fairness.²¹⁴ To facilitate an efficient school, preventative legal risk management is an essential part of sound school management;²¹⁵ yet if principals do not have adequate legal knowledge, how can they be expected to perform this essential part of their position? The Australian Principal Certification Program, which is the only national certification for principals, does not cover education law or procedural fairness.²¹⁶ However, the Australian Professional Standard for Principals²¹⁷ require principals to have knowledge and understanding of the relevant national policies, agreements, and federal and state legislation, and principals must have knowledge of the 'legislative and policy requirements in relation to serving their community and broader society'.²¹⁸

²⁰⁹ Nora M Findlay, 'Discretion in Student Discipline: Insight into Elementary Principals' Decision Making' (2015) 51(3) *Educational Administration Quarterly* 472, 482.

²¹⁰ Kelley R Taylor, 'Yesterday's Principal, Today's Legal Eagle' (2001) 1(6) *Principal Leadership* 75; Allison Jane Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact of Law on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017).

²¹¹ Tyrus L Doctor, 'Should Principals Know More About Laws?' (PhD Thesis, Prairie View A&M University, 2013).

²¹² Ibid.

²¹³ Andrew Knott and Douglas Stewart, 'Schools and the Law' (2004) *Edcare News* 17.

²¹⁴ Ibid. See also Ralph Mawdsley and Joy Cumming, 'The Origins and Development of Education Law as a Separate Field of Law in the United States and Australia' (2008) 13(2) *Australian and New Zealand Journal of Law and Education* 7.

²¹⁵ Andrew Knott and Douglas Stewart, 'Schools and the Law' (2004) *Edcare News* 17.

²¹⁶ Email from Jillian de Arago, Senior Project Director for Certified Practising Principal (CPP) to the author, 7 April 2020 <<https://www.certifiedprincipal.org/>>.

²¹⁷ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standards for Teachers' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standards-for-teachers/standards/list>>.

²¹⁸ Ibid.

In leading and managing the school, principals use a range of resources to ensure teaching staff are equipped:

Principals align management procedures and processes to the educational goals and the vision and values of the school. They ensure employment practices and decisions are consistent with legislative requirements. They allocate resources effectively to maintain the day-to-day operations of the school and evaluate impact on student outcomes and value for money. They clarify for staff the relationship between the school's vision and values and the operational tasks that support them.²¹⁹

2.3.2 *Legal Training for Principals*

Legal training for principals has been discussed by several other scholars in Australia;²²⁰ however, the landscape providing legal training to school principals has changed. Taylor found that educators require a working knowledge of the law to deal with the legal decisions that affect them and the concerns they are frequently faced with.²²¹ All government schools must follow administrative law principles and many school principals are not fully informed of the administrative law principles that apply to their decision-making processes.²²² However, as will be shown in this thesis, few NSW government secondary school principals have undertaken a university level course in education law.

2.3.3 *Pre-Service Teacher Training in Education Law*

In many Australian pre-service teacher education courses, education law is seldom taught. At best, aspects of education law are embedded into courses, units or subjects such as inclusive education (disability discrimination legislation), science education (workplace health and safety), professional practice (child protection legislation), Indigenous education (policy requirements) and physical education (duty of care); however, the quality and content covered in these courses is unknown, and often these subjects are not taught by an academic with a law degree or legal training. To address this gap, the University of Notre Dame Australia offers

²¹⁹ Ibid 18, 29.

²²⁰ Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge Needed and Held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996); Paul McCann, 'Principals' Understanding of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006); Allison Jane Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact of Law on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017).

²²¹ Kelley R Taylor, 'Yesterday's Principal, Today's Legal Eagle' (2001) 1(6) *Principal Leadership* 75.

²²² Ibid.

EDUC4022 Educational Law for Teachers and School Leaders in pre-service education programs; however, this remains an elective course for pre-service students.²²³

2.3.4 Professional Learning in Education Law

Currently, there is no mandatory requirement that NSW government school principals undertake a course or professional development in education law²²⁴ or in sound government decision-making prior to taking up principalship. The NSW Department of Education has attempted to address this gap in legal understanding by developing the NSW Public School Leadership and Management Credential ('Credential'), which is a suite of online professional development topics in those areas of law most pertinent to school principals. The NSW Department of Education has an expectation that staff who apply for school leadership positions have successfully completed the Credential program, which is a requirement for the appointment to the position of school principal.²²⁵

In the Australian context, in an attempt to address the limited educational law knowledge of school principals, the private sector now provides significant professional learning through education law seminars such as Legalwise,²²⁶ LawSense,²²⁷ ANZELA,²²⁸ CompliSpace²²⁹ and others, as the study of education law is often neglected by universities as not all aspiring principals undertake a postgraduate Master of Education study. There is a growing number of legal issues that now impact on education, which can be seen from the vast array of topics discussed at education law seminars for educators. The private sector has now taken the teaching of education law to school staff and provides a comprehensive two-day program to fill the void of formalised education law teaching. Furthermore, the private sector provides this training as a NESA approved professional development series, which assists educators in maintaining registration status.

²²³ The University of Notre Dame Australia, School of Education, *Course Descriptions* (Web Page) <<https://www.notredame.edu.au/about/schools/sydney/education/course-descriptions>>.

²²⁴ Credential Program with its 8 x 15-minute online seminars around the most common legal issues experienced by school principals, NSW Department of Education. Discussed further in Chapter 5.

²²⁵ NSW Government, Department of Education, 'NSW Public School Leadership and Management Credential', *Leadership Resources* (Web Page) <<https://education.nsw.gov.au/teaching-and-learning/school-leadership-institute/leadership-resources/nsw-public-school-leadership-and-management-credential>>.

²²⁶ Legalwise, *School Law Series* (Web Page) <<https://legalwiseseminars.com.au/course/?eventtemplate=1305-school-law-series&event=5331>>; Legalwise, *School Law for New and Aspiring School Leaders* (Web Page) <<https://legalwiseseminars.com.au/course/?eventtemplate=771-school-law-for-new-and-aspiring-school-leaders&event=3194>>.

²²⁷ LawSense <<https://lawsense.com.au/school-law-nsw>>.

²²⁸ ANZELA <<http://www.anzela.edu.au/>>.

²²⁹ CompliSpace <<https://www.complispace.com.au/education/>>.

2.3.5 Formal Post-Graduate Learning from Universities

While teachers and principals do not need law degrees, according to a number of academics²³⁰ the landscape has changed in that a school principal ought to have a Master of Education, which is inclusive of an education law course, so that they possess sufficient legal knowledge to be able to recognise situations with the potential to involve them or the school in litigation.²³¹ It is a recommendation that to address the legal knowledge aspects of a successfully compliant school, the aspiring school principal complete an introductory course on education law at a university.²³² The application of the legislation is essential understanding for principals as there are several statutory provisions that schools must take into account when establishing policies, procedures and guidelines.²³³

According to one researcher, NSW provides aspiring school principals with a Principal Development program, which leads to a certificate of school leadership and management.²³⁴ In 2015, The University of New South Wales offered an intensive course in education law, EDST5439 Legal, Industrial and Ethical Issues in Educational Leadership, which was taught by a senior in-house lawyer from the NSW Department of Education.²³⁵ There is no record that successful completion of this course is a requirement for the appointment of a school principal in NSW. Similarly, at The University of Western Australia, in the Master of School Leadership program the unit *EDUC5523 Education Law* is available to aspiring school principals; however, it remains an elective within that program.²³⁶ Additionally, this course did not run in 2020 and has been discontinued from 2021. To address this issue, The University of Notre Dame Australia has developed the education law course *EDUC6057 Educational Law for Teachers and School Leaders*, which forms part of the elective postgraduate suite of courses for aspiring

²³⁰ Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge Needed and Held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996); Paul McCann, 'Principals' Understanding of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006); Allison Jane Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact of Law on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017).

²³¹ Douglas Stewart, 'The Place of Law in the Leadership and Management of Schools' (2005) 17(4) *Education and the Law* 127.

²³² Ibid.

²³³ Ibid.

²³⁴ Tony Bush and David Jackson, 'A Preparation for School Leadership: International Perspectives' (2002) 30(4) *Educational Management and Administration* 417; Email from Jillian de Arago, Senior Project Director for Certified Practising Principal (CPP) to the author, 7 April 2020 <<https://www.certifiedprincipal.org/>>.

²³⁵ The University of New South Wales, 'Legal Industrial and Ethical Issues in Educational Leadership: EDST5439', *Handbook 2015* (Web Page) <<http://legacy.handbook.unsw.edu.au/postgraduate/courses/2015/EDST5439.html>>.

²³⁶ The University of Western Australia, 'EDUC5523 Education Law', *UWA Handbook 2020, Unit Details* (Web Page) <<https://handbooks.uwa.edu.au/units/unitdetails?code=EDUC5523>>.

school principals.²³⁷ The question raised is if aspiring or current school principals do not undertake an education law course, how do they obtain this legal knowledge?

2.3.6 *Benefits of a Generalist Education Law Course*

A majority of the respondents (96%) in Findlay's study of school administrators in Canada believed that an in-house, university level course or professional development program in education law would be beneficial to their position.²³⁸ The justification for this is that school administrators who have undertaken a such course in education law appear to have a better understanding on issues of a legal nature.²³⁹ Furthermore, a general lack of legal knowledge can reduce the school administrator's effectiveness and present future legal difficulties.²⁴⁰ If principals are equipped with adequate knowledge of education law through a certified training program, their confidence in making the correct legal decision is likely to increase, and their anxiety in decision-making is likely to decrease; however, no research or data exists on this point and it is beyond the scope of this thesis. The Review into the Functions and Operations of the Employee Performance and Conduct Directorate (EPAC) within the New South Wales Department of Education ('Tedeschi review') also mentioned professional training in managing low-level teacher misconduct for principals, DELs and Executive Directors, Educational Leadership.²⁴¹ More serious investigations of teachers were to be referred to EPAC if the consequences could result in termination from the NSW Department of Education or being placed on a Not to be Employed List.

2.4 COLLABORATION BETWEEN EXPERTS IN LAW AND EXPERTS IN EDUCATION

There has been calls that collaboration between lawyers and educators are an essential element in determining to what extent a problem or issue is legal, or where professional educational discretion is required.²⁴² The development of policy in conjunction with both lawyers and

²³⁷ The University of Notre Dame Australia, School of Education, *Course Descriptions* (Web Page) <<https://www.notredame.edu.au/about/schools/sydney/education/course-descriptions>>.

²³⁸ Nora M Findlay, 'In-School Administrators' Knowledge of Education Law' (2007) 17 *Education & Law Journal* 177.

²³⁹ Ibid 194.

²⁴⁰ Ibid.

²⁴¹ Mark Tedeschi AM QC, *Review into the Functions and Operations of the Employee Performance and Conduct Directorate (EPAC) within the New South Wales Department of Education* (Final Report, June 2019) <<https://www.education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/media/documents/EPAC-Report-2019-Final-Secured.pdf>>.

²⁴² Jay Heubert, 'The More we get Together: Improving Collaboration Between Educators and their Lawyers' (1997) 67(3) *Harvard Educational Review* 531, 544.

educators will ensure that an institutional context can be retained.²⁴³ A lawyer who neither understands the educational issue nor understands the educational context of school leaders cannot fully appreciate what the law requires in an educational setting.²⁴⁴ For education lawyers to advise school administrators effectively, the education lawyer must understand the educational practices undertaken at a school level.²⁴⁵ However, some lawyers would argue that to understand educational practice may offend and intimidate school officials, which may result in a reduced use of their services.²⁴⁶ It is therefore preferable that education lawyers have some professional experience in the school setting. In a preventative environment in education law, the lawyer is the expert in the law; however, the school administrator is the expert in the facts.²⁴⁷ The lawyer and school administrator and teacher (if applicable) must work together to resolve the issues they encounter. As the NSW Department of Education has an in-house legal team of over 20 lawyers, and provides a 'hot-desk', the NSW Department of Education is attempting to develop a positive relationship between school principals and lawyers.

2.5 CONCLUSION

This chapter has highlighted the complex, diverse and ever-changing role of school principals, and the increasing demands on principals to operate in a complex legal environment. The literature in Australia is limited in defining the scope of a government secondary school principals' duties and the changing roles and responsibilities of principals. Principals are required to maintain a high standard of leadership and management of the school, which includes decision-making that is consistent with legislative requirements.²⁴⁸ However, how competently they apply administrative law decisions in accordance with the rules of procedural fairness is unknown in the Australian context. In a study conducted by Wildy et al²⁴⁹ on principal preparation programs, principals identified the areas of dealing with underperforming staff, handling conflict, applying system policies and working with the broader community as areas of challenge. These four areas could escalate into potential legal problems in which administrative law would apply. Pre-service principals identified that they were least well

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid 563.

²⁴⁷ Ibid 565.

²⁴⁸ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standards for Teachers' (Web Page) <<http://www.aitsl.edu.au/australian-professional-standards-for-teachers/standards/list>>.

²⁴⁹ Helen Wildy, Simon Clarke, Irene Styles and Kadir Beycioglu, 'Preparing Novice Principals in Australia and Turkey: How Similar are their Needs?' (2010) 22(4) *Educational Assessment Evaluation and Accountability* 307.

prepared in the areas of underperforming staff and handling conflict,²⁵⁰ yet these are two major areas of focus in administrative law. Currently the application of procedural fairness by NSW government secondary school principals is also unknown; however, it appears to present a complex problem in principals' decision-making.

Chapter 3 discusses the law on procedural fairness in the context of government secondary schools in New South Wales.

²⁵⁰ Ibid.

CHAPTER 3

PROCEDURAL FAIRNESS IN GOVERNMENT SCHOOLS

3.1 INTRODUCTION

Chapter 2 discussed the relevance and central role of administrative decision-making and the roles and responsibilities of NSW Department of Education school principals. A key aspect of administrative decision-making in relation to student discipline, special education and industrial relations is the doctrine of procedural fairness. The purpose of this chapter is to examine the scope and application of procedural fairness in the school context. This chapter considers both common law and statutory law in the context of educational institutions and examines the common law development of procedural fairness in connection with the scope and application of procedural fairness in the government school context.

Students, parents and teachers in government (public) schools may be subjected to administrative action and may face the school administrator in charge of decision-making to determine the sanctions in accordance with policies, guidelines and procedures developed by the NSW Department of Education. Additionally, there may be school policies, procedures and guidelines that outline the school rules etc. It is a fundamental tenet of law that the decision-maker must proceed fairly, specifically that no single student should be disciplined without having the opportunity to be heard by an impartial decision-maker.²⁵¹ The hearing rule and rule against bias are discussed in sections 3.8 and 3.9 respectively. A foundational principle of administrative law is that government decision-makers are subject to ordinary procedural fairness obligations.²⁵² The development of a fair hearing and the general obligation on administrative decision-makers to proceed fairly has been entrenched in the development of the doctrine of procedural fairness:

[It] is a firmly established principle of both English and Commonwealth law that no man should be condemned unheard ... [and] the opportunity to be heard involves not

²⁵¹ Bruce Lindsay, 'University Hearings: Student Discipline Rules and Fair Procedures' (2008) 15 *Australian Journal of Administrative Law* 146. In *Battison v Melloy* [2014] NZHC 1462, 65 their Honours comment: 'I fully appreciate that the role of a school principal can be very challenging and that principals need to be able to enforce appropriate levels of behaviour and standards. However, it is also important for principals to exercise their discretionary powers in accordance with the way Parliament has prescribed.'

²⁵² Kasper Maat, Laura Hilly and Chelsea Brain, 'How to Remain Relevant and Privileged: s 38AA of the Administrative Appeals Tribunal Act 1975' (2017) 24 *Australian Journal of Administrative Law* 178.

only an opportunity to be heard and present evidence and submissions in favour of one's own case, but also an opportunity to be heard by an impartial adjudicator.²⁵³

It has been well established that a decision-maker who is subject to a duty to undertake a course of action is also subject to an obligation to proceed fairly. Applying a robust standard of procedural fairness to NSW government secondary school principals' decisions is appropriate given the possible severity of the decision.²⁵⁴ Therefore, a school principal operating at a government (public) school is obliged to consider how the decision is to be made, not just what it is that needs to be decided or acted upon. In *McMahon v Buggy*,²⁵⁵ the position was ascertained that government schools should follow the principles of procedural fairness as per Mahoney J:

There is in my opinion nothing in the nature of the power of expulsion or exclusion of a pupil from school which would render the natural justice principle inapplicable. The consequences of the exercise of power can, and often are, serious. The power is not one which in the normal case would be required to be exercised in such an emergency that some consideration to the facts in question could not be given and some opportunity afforded to the pupil to offer such defence as he may desire to do. What the principle requires may, in my opinion, in this particular context vary according to the exigency of the occasion, but this consideration would go rather to the content of the principle in its application to such a case rather than to the question whether it applies at all.

In the circumstances of the statutory form of education in force in this state, I am of the opinion that what I take to be the prima facie presumption that the natural justice principle should apply to the exercise of statutory powers having some serious consequences is not rebutted. It may be that whether the child be at the lower or higher end of the age spectrum of school pupils, the statutory consequences and practical consequences of expulsion or exclusion are such that the principle should apply, although the procedures to be followed in the case of a pupil of one age may not necessarily be appropriate to a pupil of another age.

²⁵³ Geoffrey A Flick, *Natural Justice: Principles and Practical Applications* (Butterworths, 2nd ed, 1984) 26.

²⁵⁴ For a discussion on the application of procedural fairness in non-government schools see Joan Squelch and Charles J Russo, 'A Comparative Analysis of School Discipline and Procedural Fairness in Private Schools in Australia and the United States' (2020) 23 *International Journal of Law and Education* 5; Andrew Knott, 'Exclusion from School: Established and Emerging Issues' (1996) 1(1) *Australian and New Zealand Journal of Law Education* 75; David Ford, 'School Discipline' (Research Paper, Emil Ford Lawyers, 11 June 2014) <<https://www.emilford.com.au/imagesDB/wysiwyg/SchoolDisciplinePaper2014websiteedition.pdf>>; *Bird v Campbelltown Anglican Schools Council* [2007] NSWSC 1419.

²⁵⁵ *McMahon v Buggy* (Supreme Court of New South Wales, Mahoney J, 28 December 1972), cited in Andrew Knott, 'Exclusion from School: Established and Emerging Issues' (1996) 1(1) *Australian and New Zealand Journal of Law Education* 75.

The application that the rules of procedural fairness were to apply in school exclusion decisions was further affirmed in *DM v State of New South Wales*,²⁵⁶ where Simpson J held that in making decisions to exclude students' principals had a duty to afford procedural fairness. In *CF v The State of New South Wales*,²⁵⁷ O'Keefe J relied on the concepts identified in *Kioa*²⁵⁸ that:

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

His honour also referenced NSW Department of Education policy documentation, which stated at the time:

Procedural fairness is a basic right of all individuals dealing with authorities. All communities have a legitimate expectation that Department of Education and Training officers will follow these principles in all circumstances, including when dealing with suspensions and expulsions.²⁵⁹

As discussed in Chapter 1, this thesis will limit the application of the rules of procedural fairness to the areas of student discipline, special education and industrial relations in the context of New South Wales government (public) secondary schools. Similarly, the application of procedural fairness is limited in this thesis to secondary school principals and does not extensively cover the NSW Department of Education as a whole. This thesis argues that to ensure sound decision-making at the school level that withstands external scrutiny (NSW Department of Education and external reviews or appeals), an understanding of the application of the rules of procedural fairness is essential understanding for government school principals.

3.2 PROCEDURAL FAIRNESS IN STUDENT DISCIPLINE, SPECIAL EDUCATION AND INDUSTRIAL RELATIONS

In this thesis, the concept of procedural fairness is limited to the educational context, specifically to student discipline, special education and industrial relations as principals' decision-making in these three areas directly affects an individual. Not every administrative or management decision made by a principal is subject to the rule of procedural fairness. As will be explained in this chapter, for procedural fairness to apply, the decision must affect the rights

²⁵⁶ *DM v New South Wales* (Supreme Court of New South Wales), Simpson J, 16 September 1997, cited in Paul MacMahon, 'Case Note: Procedural Fairness in Student Discipline' (1998) 3(2) *Australia & New Zealand Journal of Law & Education* 87. Also cited in Jim Jackson and Sally Varnham, *Law for Educators* (LexisNexis, 2007) 161.

²⁵⁷ (2003) 58 NSWLR 135.

²⁵⁸ *Kioa v West* (1985) 159 CLR 550, 587 (Mason J).

²⁵⁹ *CF v The State of New South Wales* (2003) 58 NSWLR 135, 11.

and interests of an individual and not a class of individuals. Procedural fairness is therefore relevant to decisions relating to student discipline, special education and industrial relations. The discussion that follows provides a justification as to why student discipline, special education and industrial relations have been selected for examination in this thesis.

3.2.1 *Student Discipline*

Several cases from the State of New South Wales are authority for the application of procedural fairness in student discipline matters.²⁶⁰ New Zealand has also experienced several challenges to student suspensions and exclusions that have addressed the concept of procedural fairness in the school context.²⁶¹ In Chapter 2 the roles of the principal were discussed and the principal was identified as the decision-maker ultimately responsible for student wellbeing, which includes discipline (see section 2.2.7). In Chapter 5 principals are asked about the process they would undertake when applying suspension and exclusion provisions to students as per the *Suspension and Exclusion of School Students: Procedure 2011*.

3.2.2 *Special Education*

The provision of education for students who have disabilities is a contentious issue that has ended up in the High Court of Australia²⁶² and is an issue that many principals deal with daily. Several Australian cases address the provision of special education in government schools.²⁶³ The process of how government secondary school principals applied the rules of procedural fairness when providing for the education of students with disabilities was examined with reference to NSW Department of Education policies,²⁶⁴ procedures and guidelines, and relevant

²⁶⁰ *McMahon v Buggy* (Supreme Court of New South Wales, Mahoney J, 28 December 1972), cited in Andrew Knott, 'Exclusion from School: Established and Emerging Issues' (1996) 1(1) *Australian and New Zealand Journal of Law Education* 75; *DM v State of New South Wales* (Supreme Court of New South Wales, Simpson J, 16 September 1997), cited in Paul MacMahon, 'Case Note: Procedural Fairness in Student Discipline' (1998) 3(2) *Australia & New Zealand Journal of Law & Education* 87. Also cited in Jim Jackson and Sally Varnham, *Law for Educators* (LexisNexis, 2007) 161; *CF v The State of New South Wales* (2003) 58 NSWLR 135.

²⁶¹ *Kennedy v Boyle* [2015] NZHC 536; *Battison v Melloy* [2014] NZHC 1462; *J suing by his Litigation Guardian v Bovaird* [2007] NZHC 560 (07 June 2007).

²⁶² *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

²⁶³ *Chinchen v NSW Department of Education and Training* [2006] NSWADT 180; *Walker v State of Victoria* [2011] FCA 258; *Burns v Director General of the Department of Education* [2015] FCCA 1769; *Tsirigotis v State of Victoria (Department of Education and Training)* [2020] FCA 1771; *Kemp v State of Victoria (Department of Education and Training)* [2018] FCA 1327; *Elliott v State of Victoria (Department of Education & Training)* [2018] FCA 1029; *Scandolera v State of Victoria* [2015] FCA 1451; *Izzo v State of Victoria (Department of Education and Training)* [2020] FCA 770.

²⁶⁴ NSW Government, Department of Education, 'People with Disabilities: Statement of Commitment', *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library/policies/people-with-disabilities-statement-of-commitment>>.

legislation.²⁶⁵ In Chapter 2 it was noted that the roles and responsibilities of the principal specifically provide for educational programs for all learners (see section 2.2.5). In Chapter 5 the participants were provided with a vignette to explain their processes when enrolling or refusing to enrol a student with learning difficulties at their school and how the rules of procedural fairness would apply.

Once the issue has left the school, the NSW Department of Education has an internal process for managing complaints.²⁶⁶ Often complaints are raised with the NSW Ombudsman for recommendation and are thus not reported. The Australian Government Department of Education, Skills and Employment has developed significant resources for the provision of students with special needs in the educational context.²⁶⁷ Anti-Discrimination NSW has published several case studies in respect to complaints they may have received regarding the provision of education.²⁶⁸

3.2.3 Industrial Relations

There are several recent cases where teachers have been terminated due to underperformance within the NSW Department of Education.²⁶⁹ For a full list of industrial relations cases, see the New South Wales Industrial Relations Commission website.²⁷⁰ The application of procedural fairness in industrial relations was selected because principals are ultimately responsible for the teaching performance of staff at their school. How principals undertook the complex task of instigating teacher improvement plans and the rules of procedural fairness is unknown. The participants process is discussed in Chapter 5.

²⁶⁵ *Disability Standards for Education 2005* (Cth); *Disability Discrimination Act 1992* (Cth).

²⁶⁶ NSW Government, Department of Education, 'Complaints Handling Policy', *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library/policies/complaints-handling-policy>>; NSW Government, Department of Education, 'Complaints, Compliments and Suggestions', *Rights and Accountability* (Web Page) <<https://education.nsw.gov.au/about-us/rights-and-accountability/complaints-compliments-and-suggestions>>.

²⁶⁷ NSW Government, Department of Education, *Students with Disability* (Web Page) <<https://www.dese.gov.au/swd/resources/exemplars-practice>>.

²⁶⁸ Anti-Discrimination New South Wales, *Disability Discrimination: Conciliations* (Web Page) <https://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_resources/adb1_equalityconciliation/conciliations_disability.aspx#Education>.

²⁶⁹ *Kent v Secretary, Department of Education* [2019] NSWIRComm 1001; *Parker v Secretary Department of Education and Communities* [2015] NSWIRComm 1020; *Buchanan v Secretary, NSW Department of Education* [2016] NSWIRComm 1045; *Davis v Secretary, NSW Department of Education* [2017] NSWIRComm 1003; *Greig v Secretary, Department of Education* [2018] NSWIRComm 1077; *Mao v Secretary, NSW Department of Education* [2016] NSWIRComm 1046; *JK v State of New South Wales* [2014] NSWSC 1084 is a case of a student–teacher sexual relationship.

²⁷⁰ Industrial Relations Commission of New South Wales, *Decisions* (Web Page) <<https://www.irc.nsw.gov.au/irc/decisions.html>>.

3.3 NATURAL JUSTICE OR PROCEDURAL FAIRNESS — WHAT IS THE PREFERRED TERM?

The idea that people should be heard before a decision affecting them is made can be traced back to the start of the 17th century, with Boswell’s case (1606)²⁷¹ and Bagg’s case (1615).²⁷² The concept of ‘procedural fairness’ was originally known as ‘natural justice’. Natural justice has theoretical and philosophical history in cases dating back as far as 1885 in the United Kingdom (UK).²⁷³ The notion of procedural fairness emerged in Australia in the 1970s, showing a contemporary usage in referring to the ground that ‘a breach of the rules of natural justice occurred in connection with the making of the decision’.²⁷⁴ The emphasis on a distinction between ‘natural justice’ and ‘procedural fairness’ is noted in *Kioa* by Mason J:

It has been said on many occasions that natural justice and procedural fairness are to be equated: see. eg *Wiseman v Borneman*; *Bushell v Secretary of State for the Environment*. And it has been recognised that in the context of administrative decision-making it is more appropriate to speak of a duty to act fairly or to accord procedural fairness. This is because the expression ‘natural justice’ has been associated, perhaps too closely associated, with procedures followed by courts of law.²⁷⁵

Procedural fairness allows for the decision-maker to apply a flexible obligation to adopt fair procedures. The terms natural justice and procedural fairness have similar meanings and are often used interchangeably, however, the term natural justice is associated with procedures used by the courts and thus the term procedural fairness is thought to be preferable when talking about administrative decision-making. The term procedural fairness is used in the Australian context and in this thesis as Australian courts are imposing a procedural standard engrained in common law.²⁷⁶

²⁷¹ Boswell’s case (1606) 6 Co Rep 48B; 77 ER 326, cited in Robert S French, ‘Procedural Fairness: Indispensable to Justice?’ (Sir Anthony Mason Lecture, University of Melbourne Law School Law Students’ Society, 7 October 2010)

<https://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>.

²⁷² Bagg’s case (1615) 11 Co Rep 95b; 77 ER 1271, 1275, cited in Robert S French, ‘Procedural Fairness: Indispensable to Justice?’ (Sir Anthony Mason Lecture, University of Melbourne Law School Law Students’ Society, 7 October 2010)

<https://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>.

²⁷³ *Voinet v Barrett* (1885) 55 LJQB 39, 41, cited in Alan Robertson J ‘Natural Justice or Procedural Fairness’ (FCA) [2015] Federal Judicial Scholarship 15

<http://www.austlii.edu.au/au/journals/FedJSchol/2015/15.html>.

²⁷⁴ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5.

²⁷⁵ *Kioa v West* (1985) 159 CLR 550, 583–584.

²⁷⁶ Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 398.

3.4 WHAT IS PROCEDURAL FAIRNESS?

The principle of procedural fairness is based on a democratic decision-making process entrenched in a common sense and common decency approach to citizens.²⁷⁷ The concept of procedural fairness is often written into constitutions, contracts, treaties, statutes, professional standards, codes of conduct, regulations and other reference documents in which an individual's rights can be affected by a decision-maker. The Australian concept of procedural fairness is procedural in nature and regulates fairness in the decision-making process rather than the outcome. This is why some judges in Australia have termed 'natural justice' as procedural fairness.²⁷⁸

3.4.1 *Social Importance of Procedural Fairness*

Several scholars have commented that decisions which are unfavourable are more likely to be accepted by people if the process by which the decision is made is fair.²⁷⁹ They may also improve the quality of the final decision by ensuring that decisions are based upon the wider range of information provided by people who exercise procedural rights.²⁸⁰ By following procedural fairness, there is an added benefit that during the process, policy-makers may review and revise the application governing decision-making and decisions in the school context by interacting with individuals exercising procedural rights. As explained by French CJ, 'procedural fairness' in Australia remains a procedural one, at least for judges and lawyers:

There is little doubt that the norms of procedural fairness reach well beyond the confines of the courtroom in judicial proceedings or judicial review of administrative decisions. They are important societal values applicable to any form of official decision-making which can affect individual interests. I do not think it too bold to say that the notion of procedural fairness would be widely regarded within the Australian community as indispensable to justice. If the notion of a 'fair go' means anything in this context, it

²⁷⁷ Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thompson Reuters, 6th ed, 2017) 397.

²⁷⁸ *Kioa v West* (1985) 159 CLR 550, 585 (Mason, J), 601 (Wilson J); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 53 (Dawson J).

²⁷⁹ Psychologists describe this as 'the fair process effect'. See Kees van den Bos, Henk AM Wilke and E Allan Lind, 'When Do We Need Procedural Fairness? The Role of Trust in Authority' (1998) 75(6) *Journal of Personality and Social Psychology* 1449; Mayowa T Babalola, Jeroen Stouten, Jeroen Camps and Martin Euwema, 'When Do Ethical Leaders Become Less Effective? The Moderating Role of Perceived Leader Ethical Conviction on Employee Discretionary Reactions to Ethical Leadership' (2017) 154(1) *Journal of Business Ethics* 85; Liesbeth Hulst, Kees Van den Bos, Arno J Akkermans and Allan Lind, 'On the Psychology of Perceived Procedural Justice: Experimental Evidence that Behavioral Inhibition Strengthens Reactions to Voice and No-Voice Procedures' (2017) 6(1) *Frontiers in Psychological and Behavioral Sciences* 1; Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michael Milo and Wibo van Rossum, 'Methodology of Legal Research: Challenges and Opportunities' (2017) 13(3) *Utrecht Law Review* 1.

²⁸⁰ Matthew Groves, *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 210.

means that before a decision is made affecting a person's interest, they should have the right to be heard by an impartial decision-maker.²⁸¹

As commented by Francis, 'The *Joint Committee of Public Accounts, Parliament of Australia, Social Responsibilities of Commonwealth Statutory Authorities and Government Business Enterprises*²⁸² explained why Commonwealth statutory authorities, in this case the provision of education under the *Education Act 1990* (NSW), should show a greater degree of social responsibility than other organisations, even if there are no legal obligations for it to do so.'²⁸³

For leadership in a democratic society to be effective it should be based on setting a good example. Or to put it another way, if public sector agencies are not prepared to do so, how can private sector entities be expected to maintain the desired standards. Hence government authorities must ... be model corporate citizens.²⁸⁴

The hearing rule and rule against bias are only one means of securing impartiality and confidence in government school decision-making affecting students, parents and teachers, and by applying the concept, the wider community may understand that procedural fairness applies well beyond the confines of the school and the NSW Department of Education.

3.4.2 Expansion of Procedural Fairness

Traditionally the process of procedural fairness was limited to processes used in the courts. However, the case of *Ridge v Baldwin*²⁸⁵ in the Privy Council extended this duty to observe procedural fairness in administrative decision-making. This was applied by the High Court in Australia in *Banks v Transport Regulation Board (Vic)*²⁸⁶ in which it was held that the board should have observed the rules of procedural fairness in their administrative decision-making in revoking a taxi licence. The breadth of interests protected by procedural fairness is wide²⁸⁷

²⁸¹ Robert S French, 'Procedural Fairness: Indispensable to Justice?' (Sir Anthony Mason Lecture, University of Melbourne Law School Law Students' Society, 7 October 2010) <<https://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>>.

²⁸² Joint Committee of Public Accounts, Parliament of Australia, *Social Responsibilities of Commonwealth Statutory Authorities and Government Business Enterprises* (Report 315, 1 April 1992) 13 <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22publications/tabledpapers/HP032016006376%22;src1=sm1>>.

²⁸³ Tryon Francis, 'Principals, Alternative Dispute Resolution, and Procedural Fairness in Australian Public Schools' (2020) 23 *International Journal of Law and Education* 85, 86.

²⁸⁴ Ibid.

²⁸⁵ [1964] AC 40, cited in Jim Farmer, 'Statutory Interpretation and Natural Justice' (1972) 30(1) *The Cambridge Law Journal* 12. Also cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 410.

²⁸⁶ (1968) 119 CLR 222, 38 (Barwick CJ).

²⁸⁷ For immigration status see *Kioa v West* (1985) 159 CLR 550, 582, 632; for business reputation see *Johns v Australian Securities Commission* (1993) 178 CLR 408; for personal reputation see *Annetts v McCann* (1990)

and applies when people want something from the government such as an ability to enrol or remain enrolled at a particular school due to the behaviour of an individual (student discipline); employment status such as continuing and permanent contracts (industrial relations); and provision of special education such as learning access plans and the application of the learning access plan. The limit to the scope of procedural fairness was explained in *Kioa* as:

It is not the kind of individual interest but the manner in which it is apt to be affected that is important in determining whether the presumption [procedural fairness] is attracted.²⁸⁸

It is therefore important to ascertain what effect a decision may have on an individual. In the three areas discussed in this thesis, almost every decision made by a school principal with respect to student discipline, special education and employment of staff (industrial relations) affects individual rights and interest and thus procedural fairness is attracted. In *Annetts v McCann*, Mason CJ and Deane and McHugh JJ explained:

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.²⁸⁹

The remarks confirmed the duty of government officials (government school principals) to observe the requirements of fairness in decision-making processes. Brennan J in *Kioa* confirmed that procedural fairness protects a vast range of privileges, benefits and advantages within the power of government officials. The concept extends to both social interests and important societal values, even though those are undefined and dynamic. The requirements of the rule against bias and the hearing rule depend on the common law statutory interpretive principles, which are applied when determining what is perceived as fair in the school context. Fairness is not only entrenched in common law duty but also in the Commonwealth Constitution, which includes the principles of neutrality and independence.²⁹⁰

170 CLR 596, 608–9 (Brennan J); for financial interest see *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

²⁸⁸ *Kioa v West* (1985) 159 CLR 550, 619.

²⁸⁹ *Annetts v McCann* (1990) 170 CLR 596, 598.

²⁹⁰ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 54; *Hogan v Hinch* (2011) 243 CLR 506, 45.

3.4.3 Fairness in Decision-Making

In *Hedges v Australasian Conference Association Ltd*, Young CJ in equity stated that ‘different situations will give rise to requirements of satisfying the general principle of natural justice in different ways’.²⁹¹ Gleeson CJ of the High Court of Australia put it in 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.²⁹²

Likewise Mason J in *Kioa* 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? It will be convenient to consider at the outset whether the statute displaces the duty when the statute contains a specific provision to that effect, for then it will be pointless to inquire what the duty requires in the circumstances of the case, unless there are circumstances not contemplated by the statutory provision that may give rise to a legitimate expectation. However, in general, it will be a matter of determining what the duty to act fairly requires in the way of procedural fairness in the circumstances of the case.

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.²⁹³

In the Federal Court of Australia, French and 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...²⁹⁴

The above cases highlight the importance of considering the particular situation and context when determining the content of procedural fairness. This is of particular importance in the education sector as government school principals may be making decisions on matters of a trivial nature (such as foul language towards a fellow student or teacher) to serious breaches with significant consequences (such as significant threats or acts of harm to others).

²⁹¹ [2003] NSWSC 1107, 121.

²⁹² *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

²⁹³ *Kioa v West* (1985) 159 CLR 550, 585.

²⁹⁴ *Appellant WABZ v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 30, 54.

3.5 STATUTORY OBLIGATION OR COMMON LAW DUTY

Unlike other nations, Australia has no constitutional right of due process²⁹⁵ or general statutory codes of fair procedures. Legislation sometimes prescribes the application or exclusion of procedural fairness, or the application of particular procedures.²⁹⁶ Aronson, Groves and Weeks noted that the courts have displayed a willingness to apply a duty of procedural fairness when the legislation is silent; the critical question will therefore be the process of procedural fairness rather than whether a duty exists.²⁹⁷ As there is no constitutional support for procedural fairness, the duty to apply the rules of procedural fairness in decision-making may be displaced by legislation expressed with sufficient clarity and applied in case law. In *Kioa*, Mason and Brennan JJ reached differing views to the scope of fairness and the threshold test. Mason J explained it as one applicable to ‘the making of administrative decisions’;²⁹⁸ however, Brennan J limited his analysis to ‘statutory powers’.²⁹⁹ When undertaking administrative decisions, the left and right of the arc is wide and can encompass decisions made under prerogative or other non-statutory powers. Following *Kioa* there has been a trend to ascertain when the threshold test should be applied and accepted in prerogative and non-statutory powers that are amendable to supervisory review.³⁰⁰

In understanding the common law or statutory intent of procedural fairness, Mason J held that the scope of the duty to observe the requirements of natural justice was:

A common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intent.³⁰¹

However, Brennan J held that any duty to observe the requirements of fairness arose from an implied legislative intent rather than common law.³⁰² Cases post *Kioa* have determined that the

²⁹⁵ In the US, due process is required by the Fifth and Fourteenth Amendments to the Constitution and codified in the federal *Administrative Procedure Act 1946*, 5 USC § 554. In Australia there is no expressed constitutional power to provide procedural fairness and courts have only gone so far in that unless parliament expressly excludes procedural fairness from legislation, then the default position is that procedural fairness is to apply in government decision making: *South Australia v Totani* (2010) 242 CLR 1, 43 (French CJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 379–84 (Heydon, J).

²⁹⁶ See, eg, *Migration Act 1958* (Cth) ss 51A, 134A.

²⁹⁷ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017).

²⁹⁸ *Kioa v West* (1985) 159 CLR 550, 584.

²⁹⁹ *Ibid* 611.

³⁰⁰ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Blyth District Hospital Inc v South Australian Health Commission* (1988) 49 SASR 501, 509; *Minister for Arts Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *Victoria v Master Builders Association (Vic)* [1995] 2 VR 121.

³⁰¹ *Kioa v West* (1985) 159 CLR 550, 584.

³⁰² *Kioa v West* (1985) 159 CLR 550, 609–11 (Brennan J).

duty to act fairly was referable to legislative intent and that the application and content of the rules of procedural fairness depended on whether legislature intended to observe the rules of procedural fairness. Brennan J's approach to the observance of natural justice was accepted as an implied term in *Saeed v Minister for Immigration and Citizenship* ('*Saeed*'), in which the court stated:

The implication of the principles of natural justice in a statute is therefore arrived at by a process of construction. It proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power of the kind [of very broad range of interests] referred to in *Annetts v McCann*.³⁰³

High Court cases post *Saeed*³⁰⁴ have confirmed that procedural fairness is deeply embedded in common law³⁰⁵ and acknowledge that the requirements of procedural fairness must apply unless excluded by intendment.³⁰⁶ That there is a strong presumption the rules of procedural fairness must apply unless excluded to the contrary was explained in *Kaur*'s case:

The common law usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.³⁰⁷

Mason J outlined that the duty to observe the requirements of fairness arises from a presumption of the doctrine of the common law. However, Brennan J accepted that a duty to observe the requirements of fairness was broad and drew a connection to the statutory provisions that should be applied for the principles to be successful. Therefore, if the statute did not provide for the rules of natural justice to be applied, an applicant could not compel the decision-maker to comply with the rules of natural justice.³⁰⁸ Brennan J commented:

There is no freestanding common law right to be accorded natural justice by the repository of a statutory power. There is no right to be accorded natural justice which exists independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power. There

³⁰³ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258 [12] ('*Saeed*'). For a discussion on implied terms, see Dennis C Pearce and Robert Stanley Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014).

³⁰⁴ (2010) 241 CLR 252.

³⁰⁵ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 349 (French CJ).

³⁰⁶ *Offshore Processing Case* (2010) 243 CLR 319, 352.

³⁰⁷ *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 (*Kaur*'s case).

³⁰⁸ *Ibid*.

is no 'right' except in the sense that a person may be entitled to apply to have a decision or action taken in purported exercise of the power set aside if the principles of natural justice have not been observed or to be compel the repository of a power to observe procedures which statute obliges him to follow.³⁰⁹

However, since *Kioa*,³¹⁰ the High Court has confirmed that procedural fairness should apply to a broad range of decisions; this would therefore extend to the decisions made by a school principal in a government school. In more recent cases such as in *Annetts v McCann*,³¹¹ the Court commented that there are two limbs to whether to include or exclude procedural fairness: the first limb is whether there is a legislative intention to observe the rules of procedural fairness; and the second limb is in the event there is not a legislative intention, is there then an implied condition to apply the rules of procedural fairness, which is then a matter of statutory interpretation. Brennan J in *Kioa* quoting *Cooper v Wandsworth Board of Wales*³¹² stated:

In either case, the statute determines whether the exercise of power is conditioned on the observance of the principles of natural justice. The statute is constructed, as all statutes are constructed, against a background of common law notions of justice and fairness and, when the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that 'the justice of the common law will supply the omission of the legislature' ... the true intention of the legislation is thus ascertained.³¹³

The common law informs the interpretive process, which determines the scope of powers and whether their exercise requires observance of the rules of fairness. Statutory interpretation proceeds on the assumption that parliaments know and accept these principles. Parliaments may influence or even displace these principles, as long as they do so with sufficiently clear language.

3.5.1 *Statutory Interpretation*

Two legal maxims apply in statutory interpretation when applying procedural fairness: *expressio unius est exclusio alterius* (when one or more things of a class are expressly mentioned others of the same class are excluded) and *expressum facit cessare tacitum* (what is expressly done causes the invalidation of what is silent). The High Court has stressed that maxims alone cannot establish an intention to exclude procedural fairness. Such maxims have

³⁰⁹ *Kioa v West* (1985) 159 CLR 550, 610–611.

³¹⁰ *Kioa v West* (1985) 159 CLR 550.

³¹¹ (1990) 170 CLR 596.

³¹² (1863) 14 CB (NS) 180, 194.

³¹³ *Kioa v West* (1985) 159 CLR 550, 609.

little weight in the application of procedural fairness since *Annetts v McCann*,³¹⁴ where the High Court confirmed that the crucial question was whether a statute contained a clear legislative intention to exclude all or parts of natural justice.³¹⁵ In the *Education Act 1990* (NSW) procedural fairness is not present in student discipline in government schools, special education or industrial relations (note that the *Teaching Service Act 1980* (NSW) specifically identifies the application of procedural fairness in teacher misconduct allegations);³¹⁶ therefore, the NSW Department of Education is required to apply the principles of procedural fairness based on a common law duty.

3.5.2 *Education Act*

The *Education Act 1990* (NSW) in conferring decision-making functions in government schools, says nothing about procedural fairness in student discipline, special education and industrial relations, in which case ‘the justice of the common law will supply the omission of the legislation’,³¹⁷ which is often known as ‘the implication rule’.³¹⁸ The courts have relied less on the technicality (judicial standard) of the rules of procedural fairness for a magnitude of reasons, but what does become apparent is the expansion of the educational institutional expertise in the official development of soft law such as policies, procedures and guidelines. When the state is executing a power over a citizen through its agencies, in this case the NSW Department of Education, citizens are entitled to be treated fairly and, therefore, accorded fair procedures. The relationship here is one of legal authority under s 21B of the *Education Act 1990* (NSW), which requires that all children attend education until they reach 17 years of age or complete year 10, whichever one comes first. Therefore, the state executes a power over children and their parent(s)/guardian(s) to attend school or be subjected to penalties under s 23 of the *Education Act*.³¹⁹ As such, the state has the power of control and the power to impose penalties and disadvantages, control over goods and services and the distribution of resources to each of these children in educational institutions. Society expects that all of its members will be treated fairly as the state exercises this power and control, and in turn, each person will be

³¹⁴ (1990) 170 CLR 596, 598–9 (Mason CJ, Deane and McHugh JJ).

³¹⁵ *Annetts v McCann* (1990) 170 CLR 596, 598–9 (Mason CJ, Deane and McHugh JJ).

³¹⁶ *Teaching Service Act 1980* (NSW) s 93D(2).

³¹⁷ *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 194 (Byles J).

³¹⁸ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 398.

³¹⁹ See, eg, *Board of Studies, Teaching and Educational Standards v Vandendovenkamp* [2016] NSWCA 268.

afforded the concept of fairness according to the standards set by the NSW Department of Education, including the right to fair treatment.

The *Education Act 1990* (NSW) is silent on the rules of procedural fairness in the areas of student discipline,³²⁰ special education and industrial relations. In *Saeed*, French CJ and Gummow, Hayne, Crennan and Kiefel JJ concluded:

The implication of the principles of natural justice in a statute is therefore arrived at by a process of construction. It proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power...³²¹

In *Plaintiff M61/2010E v Commonwealth*,³²² the court took the view that the important question surrounding the duty to observe natural justice was embedded in whether the legislators who empower a decision-maker display any intent to exclude or limit that duty. Therefore, school principals in government schools operating under the *Education Act 1990* (NSW) would have to adhere to the rules of procedural fairness.³²³

When an individual's personal rights, status or interests is going to be affected, there is a duty to observe procedural fairness in the exercise of a public power.³²⁴ The presumption applies in all circumstances where a public power is being exercised; unless specifically excluded by legislation. Mason J stated in *Kioa* that the obligation to afford procedural fairness is a common law duty:

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests, and legitimate expectations, subject only to the clear manifestation of a contrary statutory intent.³²⁵

In *Minister for Local Government & Anor v South Sydney City Council*,³²⁶ Spigelman CJ said:

³²⁰ Note that s 42(1)(h) of the *Education Act 1990* (NSW), which is concerned with the registration of non-government schools, states that 'school policies relating to discipline of students attending the school are based on principles of procedural fairness, and do not permit corporal punishment of students.'

³²¹ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 12.

³²² (2010) 243 CLR 319.

³²³ Compare with the *School Education Act 1999* (WA) ss 93, 94 where the elements of procedural fairness (hearing rule and bias rule) are implicitly present when dealing with student exclusion matters.

³²⁴ *Kioa v West* (1985) 159 CLR 550.

³²⁵ *Ibid* 584.

³²⁶ [2002] NSWCA 288, 6.

The obligation to afford procedural fairness is a doctrine of the common law which attaches to the exercise of public power, subject to any statutory modifications of the common law in that regard.

The above cases provide authority that the NSW Department of Education is not excused from the rules of procedural fairness as it is well engrained in common law that unless the statute specifically ousts the rules of procedural fairness, the relevant decision-maker (in this case the principal) must follow the rules.

3.6 DOCTRINE OF PROCEDURAL FAIRNESS

The origins of procedural fairness/natural justice can be traced back to the speeches of the House of Lords in *Ridge v Baldwin*.³²⁷ This case, which concerned the dismissal of a police officer for misconduct, developed the following principles: 1) Only in certain cases would the principles of natural justice apply; 2) An argument that giving an affected individual a hearing would make no difference could not be used as an excuse for non-compliance; and 3) The rules of procedural fairness apply to decisions made affecting an individual and not to ministerial and departmental decisions that apply to a class of persons.³²⁸ One of the early Australian cases to consider the concept of procedural fairness is *FAI Insurances Ltd v Winneke*,³²⁹ in which the High Court held that FAI would be affected by a refusal to grant a renewal for the purposes of the *Workers Compensation Act 1958* (Vic) and should be given the opportunity to be heard before a decision was made unless excluded by statute.³³⁰ The principles of *FAI Insurance Ltd v Winneke* were further developed in *Kioa*,³³¹ which provides a test as to whether a duty to observe the requirements of procedural fairness exists in a given circumstance under a particular enactment of parliament. Mason J held that the duty to observe the requirements of fairness was broad because:

[the law has reached] a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intent.³³²

³²⁷ [1964] 1 AC 40, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 410.

³²⁸ *Wiseman v Borneman* [1971] AC 297; *Re Pergamon Press Ltd* [1971] 1 Ch 388; *R v Panel on Take-Overs and Mergers; Ex parte Guinness Plc* [1990] 1 QB 146.

³²⁹ (1982) 151 CLR 342.

³³⁰ *Ibid*, 348.

³³¹ *Kioa v West* (1985) 159 CLR 550.

³³² *Ibid* 584.

In *Wood v Wood*,³³³ the duty attracts civil consequences to the individual, which may result in a student being suspended or prohibited from attending a sporting function at the school. This was further affirmed in *Twist v Randwick Municipal Council*,³³⁴ in which it was held that a full right of appeal should exist on the merits to overcome any unfairness in the initial decision. A more recent approach by the High Court is whether a process was fair in all the circumstances.³³⁵

3.7 ELEMENTS OF PROCEDURAL FAIRNESS

It is well established that procedural fairness is a basic right of all individuals in government educational institutions when their individual rights are going to be affected (eg the ability to remain enrolled at the school, to attend the school and to continue teaching at the school). Participation in decision-making is said to have an inherent value in improving the quality of administrative processes and consequential decisions.³³⁶ The case of *South Australia v Totani*³³⁷ is authority that fairness is founded upon the concepts of the hearing rule and the rule against bias.

3.8 THE HEARING RULE

A fundamental element of procedural fairness is the hearing rule, given the Latin name *audi alteram partem*, which translates to hearing both sides, requires a decision-maker to hear an affected party before making a decision that affects the interests of that person. The hearing rule entitles an individual whose interests are liable to be affected to be given notice of the relevant matters and a reasonable opportunity to respond.³³⁸ The notion of a fair hearing must be determined on social context and in a particular case. Allsop P explained that:

Analogies of the rules of the game and how the game is played may be helpful at one level, but ultimately each circumstance has to be analysed and evaluated to see whether, in a human context, a fair hearing has been provided.³³⁹

³³³ (1874) LR 9 EX 190.

³³⁴ (1976) 136 CLR 106.

³³⁵ *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 335 [30] (Kiefel, Bell and Keane JJ).

³³⁶ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 408.

³³⁷ (2010) 242 CLR 1.

³³⁸ *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487.

³³⁹ *Jeray v Blue Mountains City Council (No 2)* (2010) 180 LGERA 1 (NSWCA) 6.

3.8.1 *Right to a Fair Hearing*

The elements of the right will vary depending on the individual circumstances in which the principal or delegate at the school is investigating; however, some of the general principles are as follows:

- A student, parent or interested party should have a reasonable opportunity to make a submission,³⁴⁰ give evidence³⁴¹ and call witnesses in support.³⁴²
- Notice of various matters including the time, date and place of hearing,³⁴³ which is important in matters that are dealt with quickly at the school level.
- The subject matter in which the allegation has been made and the potential adverse consequences of the decision.³⁴⁴
- The case to be answered and adequate time to prepare submissions and gather evidence³⁴⁵ in relation to student discipline, special education and industrial relations.
- Disclosure of material to be relied upon by the decision-maker. The extent of this duty depends upon the type and nature of the decision-maker or investigator (school principal or deputy/assistant principal). In general, considering privacy legislation, material that concerns matters personal to a person who is entitled to be heard, should be disclosed to that person.³⁴⁶

3.8.2 *Notice*

Notice is one of the elements that is required to afford an affected party procedural fairness. The question applicable to school principals when issuing notice to the school community, namely, students, teachers and parents, is what constitutes sufficient notice. If a person is not afforded notice, then they cannot properly prepare a case and may not be aware of the significant consequences of a principal's or Department of Education's decision. The principal thus has a duty to 'inform the affected party why the proposed action is being taken so that he or she can have a meaningful chance of making out a contrary argument'.³⁴⁷ In some instances, for example sexual assault, stalking or threats, the requirement of notice must give way when

³⁴⁰ *Annetts v McCann* (1990) 170 CLR 96.

³⁴¹ *Beckner v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 30 FCR 49.

³⁴² *R v Hull Prison Board of Visitors; Ex parte St Germain* (No. 2) [1979] 1 WLR 1401.

³⁴³ *R v Small Claims Tribunal; Ex parte Cameron* [1976] VR 427.

³⁴⁴ *Powick v Commissioner of Corrective Services* (1996) 87 Crim R 565.

³⁴⁵ *Claro v The Minister for Immigration, Local Government and Ethnic Affairs* (1993) 119 ALR 342.

³⁴⁶ *Kioa v West* (1985) 159 CLR 550, 587.

³⁴⁷ *Mowburn Nominees Pty Ltd v Palfreyman (No 2)* [2014] QSC 320, [8] (Carmody CJ).

urgency is required. However, this can be achieved by putting into place temporary arrangements to preserve the status quo and allow the holding of a subsequent hearing later when the situation has de-intensified. Thus, notice and an opportunity to be heard prior to a decision being made, are generally regarded as fundamental.³⁴⁸

3.8.2.1 Content of a Notice

The purpose of a notice is to enable active participation.³⁴⁹ The content must be such that a student, teacher or parent is able to participate fully and effectively in the circumstances of the case. An issue with respect to a notice arises in that some students in secondary school (and some parents) are illiterate and would be unable to comprehend a notice served upon them. The courts have taken the position that a notice can be served in a variety of modes,³⁵⁰ however, it must conform to some simple principles:

- As per Lord Denning, ‘if a right to be heard is worth anything, it must carry with it the right to know the case that has to be met.’³⁵¹
- The issues of the case are of paramount importance and should be provided in sufficient detail to enable participation.³⁵²
- Notice must convey to the recipient with ‘reasonable clarity’ what is the duty that its service imposes upon them. The recipient should not have to strain for a meaning or be left in confusion as to what was intended.³⁵³
- Notice must advise the time, date and location of any hearing,³⁵⁴ or the closing date and place for lodgement of written submissions.³⁵⁵
- The key issues and potential consequences of the proposed decision must be accurately stated.³⁵⁶

³⁴⁸ *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 530, 532.

³⁴⁹ *Ibid.*

³⁵⁰ *Traill v McRae* (2002) 122 FCR 349, 380–1 (FCAFC).

³⁵¹ *Kanda v Government of Malaysia* [1962] AC 322, 337 (PC).

³⁵² *R (Bourgass) v Secretary of State for Justice* [2016] AC 384, 422.

³⁵³ *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 122 FCR 78, 104.

³⁵⁴ *Hopkins v Smethwick Board of Health* (1890) 24 QDB 712, 715, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 532.

³⁵⁵ *Graham v Baptist Union of NSW* [2006] NSWSC 818, 49.

³⁵⁶ *Board of Trustees of the Maradana Mosque v Mahmud* [1967] 1 AC 13, 24–5.

- In situations where an individual faces disciplinary proceeding that carry the potential for a finding of fault or misconduct on the part of the person notified, the requirement of certainty is stringent.³⁵⁷ These elements include:
 - all charges to be relied on,³⁵⁸
 - relevant legislative provisions;³⁵⁹
 - particular grounds if there are several alternatives;³⁶⁰
 - particulars of the act, manner or allegations; and³⁶¹
 - potential penalties involved.³⁶²

3.8.2.2 Period of Notice

The adequacy of the period of notice is a question of fact in the given circumstances. Instances of a trivial nature at the school with low level consequences could be given little notice; however, instances that have serious consequences possibly require greater notice. However, if the notice period was too long, it could be viewed as ‘justice delayed may be justice denied’,³⁶³ and it could be possible that a period of notice was so long as to create unfairness.³⁶⁴

3.8.2.3 Service of Notice

The requirements of procedural fairness concerning service will vary with the circumstances at the school. In instances involving decisions with serious consequences, a requirement of actual notice is likely to be required. Good decision-making at the school by the school principal would always suggest providing notice regardless of the consequences. The actual form of notice moves with the times and new approaches to the notice such as email and text messaging,³⁶⁵ which schools commonly use to communicate with the school community, can be utilised. The advantages of these technologically advanced forms of notice for affected persons are convenience, continuity and certainty.³⁶⁶ For the school principal, if the email

³⁵⁷ *Sabag v Health Care Complaints Commission* [2001] NSWSC 411, 83.

³⁵⁸ *Re Macquarie University; Ex parte Ong* (1989) 17 NSWLR 113.

³⁵⁹ *R v Pharmacy Board of Victoria; Ex parte Broberg* [1983] 1 VR 211.

³⁶⁰ *Carbines v Pittock* [1908] VR 292, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017), 533.

³⁶¹ *Tarson Pty Ltd v Holt* (1991) 25 ALD 730.

³⁶² *Auckland Boxing Association Inc v NZ Boxing Association Inc* [2001] NZAR 847, 859–60.

³⁶³ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 535.

³⁶⁴ *Petrou v Roads and Traffic Authority (NSW)* (1991) 24 ALD 201, 202.

³⁶⁵ *Singh v Minister for Immigration and Border Protection* (2015) 231 FCR 573, 586.

³⁶⁶ *Sainju v Minister for Immigration and Citizenship* (2010) 185 FCR 86, 94, 95.

bounces or is undeliverable or the text message fails, then notice can be provided in an alternative format, such as registered mail.

3.8.2.4 Disclosure

The duty of disclosure is a more specific requirement, which compels a principal to alert the person entitled to be heard to the questions or critical issues to be addressed.³⁶⁷ Fairness can generally require that the affected party be informed of what was obtained.³⁶⁸ In the instance that an investigator or decision-maker obtains material from other sources (eg more students come forward, or a teacher or parent adds information) the key issues appear to be whether the material will be considered by the principal,³⁶⁹ and if so, whether the person affected has had an opportunity to address it.³⁷⁰ It is not possible to afford a fair hearing if the parties are not fully informed of and able to respond to the relevant issues. Given the dynamic nature of the school community, it is not uncommon for surprises to occur. In such an event, fairness would require that disclosure to the parties and an opportunity to respond would be provided. However, the point in time at which a principal must make a decision will always arrive.³⁷¹ In the school context, disclosure may have the potential to cause harm to a fellow student, staff member or parent. In such instances, disclosure of the substance, but not the detail, of the material will often achieve a satisfactory compromise between the potentially conflicting demands of disclosure and confidentiality.³⁷² There is generally no requirement that the principal disclose their mental processes or proposed conclusions when decision-making;³⁷³ however, the principal can provide some indication of their preliminary views as the case proceeds.³⁷⁴ What is worth noting is that principals seldom make decisions in isolation, rather, deputy principals (assistant principals or heads of departments in small high schools) assist principals in decision-making by providing principals with written briefs and recommendations.

In *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* ('Alphaone'),³⁷⁵ it was held that disclosure should occur if any adverse conclusions not obviously open on the

³⁶⁷ *Kioa v West* (1985) 159 CLR 550, 587 (Mason J); *Commissioner for The Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 590–1 ('Alphaone').

³⁶⁸ *ATP15 v Minister for Immigration and Border Protection* [2016] FCAFC 53, 53–4.

³⁶⁹ *Rawcliffe v Banco Hiring Services Pty Ltd* [2002] SASC 430, 33.

³⁷⁰ *Bedro v Minister of State for Immigration and Ethnic Affairs* (Federal Court of Australia, Keely J, 26 August 1987), cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 544.

³⁷¹ *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50, 180.

³⁷² *Fernando v Minister for Immigration and Indigenous Affairs* [2003] FCA 975, 59–60.

³⁷³ *Hala v Minister for Justice* (2015) 145 ALD 552, 66.

³⁷⁴ *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, 599.

³⁷⁵ (1994) 49 FCR 576.

known materials. That is, if information is obtained about one person from another person (say another student or teacher) that is likely to influence the outcome, they should be given the opportunity of dealing with it. The High Court explained in *Alphaone* the fundamental issues:

where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.³⁷⁶

Two limbs arise from this case in that the decision-maker is required to advise of any adverse conclusions made; however, the decision-maker does not have to explain their mental processes in arriving at their decision. This has implications on school principals because a statutory body exists that can make a decision that can adversely affect an individual's rights, interests or legitimate expectations directly or indirectly; therefore, the principals must ensure that the procedures are followed in making the decision. School principals' administrative decision-making is somewhat of a political arena because the decision-maker must reflect the wider interests of the school community beyond just those of the participants in the hearing; for example, suspensions for swearing should be provided consistently across the school community if that is an appropriate consequence in the circumstances. With pressure from the school community to make consistent and good decisions, the principal would need to use their experience and expertise in resolving the issue at hand.

3.8.3 *Conduct of Hearings*

Hearing procedures vary enormously between principals and decision-makers. If a party is not given a reasonable opportunity to make relevant submissions,³⁷⁷ give evidence³⁷⁸ or call witnesses in support,³⁷⁹ or if the affected person is given a hearing date that the principal knows the party cannot attend,³⁸⁰ procedural fairness is denied. The failure to accommodate may breach the hearing rule and in some circumstances may be perceived as actual bias.³⁸¹ However, the courts have held that if an affected person has been provided with enough of a chance, then fairness requires no more.³⁸² In instances where the school principal rather than the parties

³⁷⁶ Ibid 590–1.

³⁷⁷ *Annetts v McCann* (1990) 170 CLR 596.

³⁷⁸ *Beckner v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 30 FCR 49.

³⁷⁹ *Moore v Guardianship and Administrative Board* [1990] VR 902, 914.

³⁸⁰ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

³⁸¹ *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425.

³⁸² *Cawley v Casey* [2007] QSC 5, 32.

(student, parent(s) or teacher) has primary responsibility for the fact-gathering process, the quality of material obtained will inevitably depend on the independence, professionalism, experience, training, career-structure and diligence of the school principal.³⁸³ A competing issue for principals is that they should facilitate proceedings in a just, quick and cheap³⁸⁴ manner as students may be missing out on education while a decision is being made. Similarly, the school executive may need to take a more active role in assisting the students and/or parents at an adjudicative hearing so that the student and/or parents are able to make an ‘effective choice’.³⁸⁵ Nettle J explained that:

there is a difference between providing legal advice and explaining in the course of a hearing to unrepresented litigants the nature and effect of the various processes which are being undertaken and as to the steps open for the litigants to take. In that sense, a higher burden of explanation and assistance may fall upon a member of the Tribunal than would fall upon a judge in a curial proceeding in which the parties are represented by counsel.³⁸⁶

There may be instances where the school principal cannot proceed because the parties do not understand the case against them. In *Wade v Comcare*, Drummond and Dowsett JJ observed that there was ‘a clear line ... between persuading a self-represented party as to the appropriateness of a suggested course and ... overriding his or her right to decide’.³⁸⁷ In such instances, the principal may need to make clear the issues to be addressed through a level of guidance. The Full Federal Court recently suggested that support ought to be provided such that:³⁸⁸

a Judge should intervene in a hearing where there is manifest unfairness or manifest procedural unfairness. And it may be that public law cases involve different considerations than those applicable in private law or commercial litigation.

Noting that one of the consequences of the dominance of the adversarial model is its preference to oral hearings, the principal will need to firstly address whether to allow affected persons to participate by way of written submissions, oral hearings or a combination of the two. The courts have rejected any suggestion that there is a right to an oral hearing in administrative

³⁸³ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 570.

³⁸⁴ *Civil Procedures Act 2005* (NSW) s 56.

³⁸⁵ *MZAIB v Minister for Immigration and Border Protection* (2015) 238 FCR 158, 175.

³⁸⁶ *Collection House Ltd v Taylor* (2004) 21 VAR 333, 27.

³⁸⁷ *Wade v Comcare* (2002) 69 ALD 602, 607.

³⁸⁸ *Francuziak v Minister for Justice* [2015] FCAFC 162, 43.

proceedings,³⁸⁹ and instead emphasise that it depends on the circumstances of the case.³⁹⁰ The question for school principals to afford an oral hearing is ‘not susceptible of a single answer of universal application’.³⁹¹ The critical question for principals is whether the issue can be presented and decided fairly only by written submissions.³⁹² Of significant note is the principals ability to consider to ‘entertain and give consideration to submissions seeking to establish that an oral hearing is required’,³⁹³ if applicable in the circumstances. In *Re Minister for Immigration and Multicultural Affairs; Ex parte P T*,³⁹⁴ it was suggested that an oral hearing may be necessary where it is clear that affected persons are unlikely to be able to prepare written submissions, or unlikely to obtain assistance to do so. An approach suggested in *R (West) v Parole Board*³⁹⁵ was that a decision-maker could firstly assess written submissions and then consider whether the decision is likely to turn on issues that are suited for resolution at an oral hearing.

3.8.4 School Principal’s Attentiveness During the Decision-Making Process

If the decision-maker is not observant and alert during a hearing, such as sleeping through a hearing, the decision-maker denies procedural fairness on the hearing rule.³⁹⁶ Complexities arise if a decision-maker is half attentive to the matter, in which case it would be difficult for the applicant to satisfy the onus of complete failure of procedural fairness,³⁹⁷ but more relevant and applicable to school principals is a failure to consider submissions.³⁹⁸ This point is important in the context of the secondary school principal; as they are tasked with a magnitude of matters³⁹⁹ that often require immediate resolution (see Chapter 2 on the duties of a school principal and the AITSL Principal Standards), at the time of the hearing they may not be able to give their full attention to the hearing. In *Dranichnikov v Minister for Immigration and*

³⁸⁹ *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 336.

³⁹⁰ *Robb v Chief Commissioner of Police* (2005) 23 VAR 244, 273.

³⁹¹ *Tinkerbelle Enterprises Pty Ltd as Trustee for the Leanne Catelan Trust v Takeovers Panel* (2012) 208 FCR 266, 289.

³⁹² *R (Thomson) v Law Society* [2004] 1 WLR 2522, 51.

³⁹³ *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 338.

³⁹⁴ (2001) 75 ALJR 808, 813.

³⁹⁵ [2005] 1 WLR 350, 67.

³⁹⁶ *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470. In *Cesan v Director of Public Prosecutions (Cth)* (2008) 236 CLR 358, the High Court assessed the conduct of a trial judge who slept through the majority of a criminal trial. The court concluded that this had the effect of a miscarriage of justice with the appearance of unfairness.

³⁹⁷ *Orgona v Canada (Minister of Citizenship and Immigration)* [2001] FCT 346, [10]–[14].

³⁹⁸ *Re National Parks and Nature Conservation Authority; Ex parte McGregor* [2001] WASCA 368, [131]–[132] (authority members had no time to read written submissions).

³⁹⁹ See Deloitte, *Principal Workload and Time Use Study* (Report, NSW Government, September 2017) <<https://education.nsw.gov.au/content/dam/main-education/gef/media/documents/Principal-workload-and-time-use-study-Nov-2017.pdf>>.

Multicultural Affairs ('Dranichnikov'),⁴⁰⁰ it was found that the decision may require 'proper, genuine and realistic consideration', which will vary according to the circumstances (in the context of education this will be based on the severity of the consequences), including the statutory context (that is, what a government school principal is required to do). The principles of procedural fairness are satisfied by a decision-maker in applying 'proper, genuine and realistic consideration' when a person who exercises a right to be heard makes submissions relevant to a mandatory consideration that has a jurisdictional basis.⁴⁰¹

3.8.5 *Procedural Fairness During the Process*

Ainsworth v Criminal Justice Commission,⁴⁰² is authority that preliminary or intermediate decisions may also be subject to the same obligations as the final decision affecting an individual's interests. Similarly, recommendations, investigations, and preliminary or provisional decisions forming part of the decision-making process and made in exercise of a statutory power have been found to attract procedural fairness.⁴⁰³ Therefore, when a school principal makes a determination of student discipline, teacher suspension from the workplace (industrial relations) or the allocation of funding per student identified with learning difficulties (special education), their processes in forming that decision could attract procedural fairness.

3.8.6 *Urgency*

The courts have accepted that in urgent situations, procedural fairness can be excluded. The principal may be faced with serious situations where a decision needs to be made immediately for the safety and welfare of staff and students. These situations are generally addressed in NSW Department of Education policy documents, where direction is provided to exclude procedural fairness.⁴⁰⁴ Where a teacher is barred from working with children, s 93T(3) of the *Teaching Service Act 1980* (NSW)⁴⁰⁵ directs that the decision is made without complying with the rules of procedural fairness. However, this does not extend to poor teaching performance⁴⁰⁶ or

⁴⁰⁰ (2003) 77 ALJR 1088.

⁴⁰¹ Ibid [25]–[27]; the tribunal failed to address Mr Dranichnikov's submissions and this was the first of several steps that the tribunal was required to take. *Minister for Immigration and Multicultural and Indigenous Affairs v WAFJ* (2004) 137 FCR 30, 55–7 may provide an example of a breach of procedural fairness resulting from a failure to give proper, realistic and genuine consideration to oral submissions.

⁴⁰² (1991) 175 CLR 564, 578 (Mason CJ, Dawson, Toohey and Gaudron JJ).

⁴⁰³ Ibid.

⁴⁰⁴ NSW Government, Department of Education, 'Procedural Fairness in the Department of Education', *Legal Issues Bulletins and Guidelines* (Web Page) <<https://www.education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/procedural-fairness>>.

⁴⁰⁵ *Teaching Service Act 1980* (NSW) s 93T(3).

⁴⁰⁶ *Teaching Service Act 1980* (NSW) s 93G–93J.

general misconduct,⁴⁰⁷ even though the school community may view poor teaching performance as an urgent action. In the long term, urgency can limit but cannot deny an opportunity to be heard.⁴⁰⁸ Thus, considerations of urgency are best applied so far as reasonably practicable in the circumstances of the case,⁴⁰⁹ noting that principals make decisions that are urgent to protect the welfare of the school community.

3.8.7 Rules of Evidence

The rules of evidence influence but do not determine the content of procedural fairness.⁴¹⁰ As a general rule, principals are not bound to observe the rules of evidence. School principals are exempt from the rules of evidence, which as the decision-maker allows them freedom ‘from certain constraints otherwise applicable in courts of law’.⁴¹¹ Many of the rules of evidence are ‘founded on principles of common sense, reliability and fairness’⁴¹² that have value to school principal administrative decisions. Freed from the strict rules of evidence, the principal must still decide whether the material available should in fact be considered. Similarly, the rules of evidence do not allow the school principal to ‘draw inferences or jump to conclusions, which the available material did not adequately support’.⁴¹³ The no evidence rule, which is a more recent element of procedural fairness, provides that a decision-maker makes a decision based on actual evidence as opposed to speculation or hearsay. In *Minister for Immigration and Multicultural Affairs v Rajamanikkam*,⁴¹⁴ Gleeson CJ and Kirby J stated that the duty ‘to base a decision on evidence’ is a requirement as to ‘the way the decision-maker is to go about the task of decision-making’ and is part of a legal requirement of procedural fairness.⁴¹⁵ *Dranichnikov* extends the duty of procedural fairness to require the principal to act rationally, respond to the case made by a party and base the decision on probative evidence.⁴¹⁶

⁴⁰⁷ *Teaching Service Act 1980* (NSW) s 93A–93D.

⁴⁰⁸ *Marine Hull and Liability Insurance Co Ltd v Hurford* (1986) 10 FCR 476.

⁴⁰⁹ *South Australia v Slipper* (2004) 136 FCR 259 (FCAFC), 284–7.

⁴¹⁰ *Browne v Dunn* (1893) 6 R. 67, HL, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017), 608.

⁴¹¹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909.

⁴¹² *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555, 579 (Flick and Perry JJ).

⁴¹³ *Roberts v Balancio* (1987) 8 NSWLR 436.

⁴¹⁴ (2002) 210 CLR 222, 232–3.

⁴¹⁵ *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, [135]–[136].

⁴¹⁶ *Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 16, [79]–[92].

3.8.8 *Cross-Examination*

Cross-examination is not an essential element of a fair hearing,⁴¹⁷ and there is no rigid rule that fairness always requires cross-examination to be allowed in administrative hearings.⁴¹⁸ The question is not whether cross-examination should be allowed, but whether it is required for a fair hearing. Spender J explained that:

While a right to cross-examination is not necessarily recognised in every case as an incident of the obligation to afford procedural fairness, the right to challenge by cross-examination a deponent whose evidence is adverse, in important respects, to the case a party wishes to present it, is.⁴¹⁹

In school-based cases it is possible for the principal to strike a balance by allowing parties to examine and cross-examine witnesses if appropriate in the circumstances; the principal can then ask their own questions on issues left unclear by the parties.

3.8.9 *The Investigator*

Schools have a legal duty to investigate allegations; however, the law is silent on who the investigator should be.⁴²⁰ The task may be delegated by the school principal to internal staff, or persons external to the educational institution. It may be appropriate for external investigators to be engaged in matters surrounding complaints against the school principal or executive; in matters where a conflict of interest exists (eg where a personal relationship exists between the staff member and investigator); the educational institution does not have the requisite skills to undertake the investigation in a legally competent manner; or the educational institution does not have the resources to undertake the investigation.

3.8.10 *Delegation of the Hearing Function to Deputy Principals*

There is no strict rule related to procedural fairness that the person empowered to decide a matter must be the one who hears the evidence of those granted a hearing. The hearing task, as with the power to decide, may be delegated to another member of the school executive (such as the deputy principal or head of department) or even a classroom teacher.⁴²¹ Unless procedural fairness requires an oral hearing, there can be no objection to one being conducted by someone

⁴¹⁷ *Ramsay v Australian Postal Commission* (2005) 147 FCR 39, 47.

⁴¹⁸ *Sullivan v Civil Aviation Safety Authority* (2014) 226 FCR 555, 595–6 (Flick and Perry JJ).

⁴¹⁹ *Ramsay v Australian Postal Commission* (2005) 147 FCR 39, 47.

⁴²⁰ David Ford, 'School Discipline' (Research Paper, Emil Ford Lawyers, 11 June 2014) <<https://www.emilford.com.au/imagesDB/wysiwyg/SchoolDisciplinePaper2014websiteedition.pdf>>.

⁴²¹ *Education Standards Authority Act 2013* (NSW).

subordinate to the school principal, provided they consider any written submissions by the student, parent(s)/guardian(s) or teacher. The practice of principals delegating decision-making powers to deputy principals is ‘an internal administrative arrangement’⁴²² that is common within the NSW Department of Education. Furthermore, the New South Wales Court of Appeal explained that ‘there is nothing objectionable in principle to a decision-maker delegating part of its functions, in relation, for example, to the taking of submissions and the conduct of consultations, to an officer or committee of its members’.⁴²³ Thus, in such cases it may be sufficient for the principal to simply adopt the findings and recommendations of the person who performed the hearing function, without being required to consider the evidence or submissions personally.⁴²⁴ It must be noted that the principal would need to be satisfied that the hearing was conducted fairly and that the initial decision-maker took into account all the relevant matters.

3.8.11 Representation

There is generally no right to representation in matters involving the school; however, this may vary depending on the circumstances and the consequences of the case.⁴²⁵ Thus, questions about representation have no single answer; the question the principal must be satisfied with is whether limiting representation would render the process unfair. With the granting of representation

it is important to bear in mind that the Tribunal hearing is generally the first and last opportunity that an applicant has for merits review of the original decision. Although an unrepresented non-English speaking applicant in judicial review proceedings is at a crippling disadvantage, the lack of representation at the earlier stage of merits review is probably of greater significance in terms of its effect upon the eventual outcome.⁴²⁶

If representation is not permitted, it may be still appropriate and even required to allow another person to accompany and assist the person entitled to be heard.⁴²⁷ Students (minors) may be classified as a vulnerable group of individuals, and to protect their fundamental rights it would be seen as appropriate to allow a support person and/or representative. The New South Wales

⁴²² *Cassell v R* (2000) 201 CLR 189, 193–4 (Gleeson CJ, Gaudron, McHugh and Gummow JJ).

⁴²³ *Greyhound Racing NSW v Cessnock & District Agricultural Association* [2006] NSWCA 333, 126.

⁴²⁴ *Hyster Australia Pty Ltd v Anti-Dumping Authority* (No 1) (1993) 112 ALR 582, 597–8.

⁴²⁵ *Cains v Jenkins* (1979) 28 ALR 219, 230, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017), 594.

⁴²⁶ *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271, 295.

⁴²⁷ *Krstic v Australian Telecommunications Commission* (1988) 20 FCR 486, 491–3.

Court of Appeal has suggested that decisions to permit non-legal representation should be guided by the following:⁴²⁸

- the complexity of the case;
- any particular difficulties faced by the applicant, such as language barriers;
- the absence of disciplinary proceedings or other professional codes to regulate lay representatives;
- the potential risk that other parties might face by the participation of unregulated and uninsured lay representatives; and
- the possibility that lay advocates might hamper rather than assist the efficient resolution of proceedings.

3.8.12 *Interpreters*

Given the complex multicultural nature of Australia, to afford procedural fairness it may be necessary in some circumstances for the party to be permitted the assistance of an interpreter at a hearing. The judgement a principal would need to make is whether an affected person cannot adequately participate in the hearing without an interpreter.⁴²⁹ The New Zealand Court of Appeal has stated that ‘the requirements of fairness cannot be met if a person does not understand the questions put to them and therefore does not have a fair opportunity to answer’.⁴³⁰ Justice Graham suggested that ‘a fair hearing requires that there can be no doubt at the outset that an applicant seeking review can comprehend that which is being spoken and interpreted’.⁴³¹ However, of some comfort to principals is that a relatively minor or inconsequential error of interpreting will not be sufficient to establish a denial of procedural fairness.⁴³²

3.8.13 *Adjournments*

The refusal of an adjournment may amount to a denial of procedural fairness if it is likely to deny a party (student, parent or teacher) a reasonable opportunity to present their case.⁴³³ Adjournments are like all other elements of procedural fairness; the requirement for them depends on the circumstances. Adjournments can be critical to a party being able to present

⁴²⁸ *Giancaspro v SHRM (Australia) Pty Ltd* (2005) 93 SASR 32, 34–5.

⁴²⁹ *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75, 77–8.

⁴³⁰ *Attorney-General v Udompun* [2005] 3 NZLR 204, 225.

⁴³¹ *SZGYM v Minister for Immigration and Citizenship* [2007] FCA 1923, 29.

⁴³² *WALN v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1704, 41.

⁴³³ *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

their case sufficiently, which is where fairness becomes an issue. The length of the adjournment can depend on the reasonable time required to deal with the issue for which the adjournment was granted.⁴³⁴ The decision to grant an adjournment is highly discretionary.⁴³⁵ The granting of an adjournment involves balancing the consequences of refusal for the party who seeks the adjournment against the adverse consequences of an adjournment for other parties, witnesses and the public interest in general. There may be instances where the principal should offer an adjournment, regardless of whether one has been requested.⁴³⁶ If the principal delays their decision for an extended time, it will usually be safer for an affected person to seek an order to compel the school principal to perform their duty rather than allege a denial of procedural fairness after the decision has been made.

An issue that unfortunately occurs in the school context is when administrative proceedings that are disciplinary in nature commence while criminal charges are pending.⁴³⁷ There has been suggestions that concurrent criminal and administrative proceedings should be avoided because a person cannot effectively participate in both matters.⁴³⁸ The school principal must weigh up whether it is appropriate to delay administrative proceedings, which may include the importance of maintaining a safe learning environment, and whether any criminal proceedings will proceed.

3.8.14 *Summary of the Hearing Rule*

The hearing rule can be summarised simply as a requirement to hear the affected party. However, what must be considered is that there are several elements to the hearing rule, as discussed in the proceeding paragraphs, such as the period of notice and representation when providing an affected party a fair hearing. Principals need to remember the famous adage from Gleeson CJ of the High Court of Australia:

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.⁴³⁹

⁴³⁴ *L v Human Rights and Equal Opportunity Commission* (2007) 223 ALR 432, 21.

⁴³⁵ *Blazevski v Judges of District Court New South Wales* (1992) 29 ALD 197, 200 (Kirby P).

⁴³⁶ *Burringbar Real Estate Centre Pty Ltd v Ryder* [2008] NSWSC 779, 82–92.

⁴³⁷ *Yoxon v Secretary to the Department of Justice* [2015] VSC 124.

⁴³⁸ *Re Matthews; Ex parte Harrison* [2001] WASC 61, 50.

⁴³⁹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 13–14.

The court will most likely take the view that the principal as the decision-maker is attempting to comply with the hearing rule in procedural fairness, even if they miss a step.

3.9 RULE AGAINST BIAS

The requirement that a decision-maker must not be biased is the second limb of procedural fairness. Impartiality in decision-making is regarded as an essential element to the operation of school-based decisions and of public power, which forbids decision-makers from exercising their power if they are actually or ostensibly biased. The rule against bias, given the Latin name *nemo debet esse iudex in propria sua causa*, gives rise to the concept that no-one may judge their own matter and that a decision-maker must disqualify themselves if there is any doubt of impartiality. The rule against bias is flexible in approach; however, it is judged by reference to a hypothetical objective observer, in this thesis this would be against the standard applied by other secondary school principals who are fair minded and informed of the circumstances. The rule against bias allows for school principals to apply a community standard and move with the times.⁴⁴⁰ In *British American Tobacco Australia Services Ltd v Laurie*,⁴⁴¹ it is the judges who decided what a hypothetical observer knows and what the observer will and will not accept. Ensuring the objective appearance of impartiality and the absence of prejudgement is the basis of the rule against bias⁴⁴² which can be difficult to maintain in the school context because the principal has day-to-day contact with the parties; unlike those of immigration cases where the doctrine is developed. It must be noted that the outcome of every bias claim will depend heavily on its particular facts, and thus past cases provide limited value and guidance. For a bias claim to be successful, the party claiming bias must explain the bias; however, there is limited case law that explains the level of detail required. In *Webb v R*,⁴⁴³ Deane J described the wider context in which bias is raised as ‘four distinct, though sometimes overlapping categories’ of bias. The four categories are interest, conduct, association and extraneous information.

3.9.1 Definition of Bias

The English Court of Appeal has described bias as ‘a predisposition or prejudice against one party’s case or evidence on an issue for reasons unconnected with the merits of issue’.⁴⁴⁴ In the

⁴⁴⁰ *Ebner v Official Trustee* (2000) 205 CLR 337, 350 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁴⁴¹ (2011) 242 CLR 283, 306 (French CJ).

⁴⁴² *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70.

⁴⁴³ (1994) 181 CLR 41, 74.

⁴⁴⁴ *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117, [28], citing *R v Inner West London Coroner; Ex parte Dallaglio* [1994] 4 All ER 139, 151.

US, Scalia J suggested that bias or prejudice is a ‘favourable or unfavourable disposition that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess’.⁴⁴⁵ In Australia, in *R v Watson; Ex parte Armstrong*,⁴⁴⁶ Barwick CJ and Gibbs, Stephen and Mason JJ quoting *R v Sussex Justices Ex parte McCarthy*⁴⁴⁷ stated:

It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. After saying that he stood by that principle, Lord Denning MR continued [1969] 1QB at 599: “... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand ... Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough ... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased.’”⁴⁴⁸

The rule against bias allows for predisposition but not prejudgement as the case suggests that bias does not exist solely on the premise that the principal holds a point of view on issues relevant to the matter. Bias occurs when the school principal’s decision-making tends against one party to a dispute without good reason. Thus, the rule against bias is best understood as requiring an open mind but not an empty one.⁴⁴⁹ However, it must be noted that it would be unreasonable to appoint a school principal with views so extreme that the rule against bias would invariably preclude a principal from making the majority of the decisions involving students, parents and teachers; for example, a principal with the view that LGBTI+ students

⁴⁴⁵ *Liteky v United States* 510 US 540 (1994), 550, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017), 645.

⁴⁴⁶ (1976) 136 CLR 248, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017), 645.

⁴⁴⁷ [1924] 1 KB 256, 259, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017), 681.

⁴⁴⁸ *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 561–2.

⁴⁴⁹ *Yukon Francophone School Board, Education Area #23 v Attorney-General of the Yukon Territory* [2015] 2 SCR 282, 300.

should be excluded from public education, pregnant women should not be in the workplace, or students with special needs should attend special schools.

3.9.2 *Ebner Two-Step Approach*

As school principals will be engaged with staff, students, parents and the wider community, in making decisions that adversely affect individuals, the *Ebner v Official Trustee* ('*Ebner*')⁴⁵⁰ two-step approach is not binding as this is often reserved for members of the bench; however, it is useful for principals to be mindful of the concepts. The first step of the *Ebner Two-Step* approach is concerned with judicial decision making where a judge has a financial interest in the outcome (eg the price of shares increases as a result of a decision, and the judge holds shares that are worth a substantial amount). The second step is 'when courts acknowledge that the effect of the relevant interest is so obvious that the second step becomes little more than a formality.'⁴⁵¹ A flexible application of the rule against bias for decision-makers is preferred because it enables the operation of the rule to be tailored to the circumstances of each case. McHugh J in *Hot Holdings Pty Ltd v Creasey* reasoned that:

While the test for a reasonable apprehension of bias is the same for administrative and judicial decision-makers, its content may often be different. What is to be expected of a judge in judicial proceedings or a decision-maker in quasi-judicial proceedings will often be different from what is expected of a person making a purely administrative decision.⁴⁵²

It would be appropriate to conclude that when school principals understand the concept of bias and have undertaken significant professional experience and tertiary degrees, they would be able to free themselves from bias. However, in instances where the principal has a relative or close personal friend in the school and their decision will ultimately affect that person, as a matter of good practice the principal should recuse themselves. In situations such as these, another principal from within the NSW Department of Education should be appointed to make the decision.

⁴⁵⁰ (2000) 205 CLR 337.

⁴⁵¹ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017), 650.

⁴⁵² *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 43.

3.9.3 *Actual and Apprehended Bias*

Aronson, Groves and Weeks⁴⁵³ describe actual bias as ‘a decision-maker approaching the issues with a closed mind or having prejudged them and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.’ Apprehended bias is less conclusive, being a finding that an objective, fair minded and reasonably well-informed principal might not approach the issues with an open mind.⁴⁵⁴ The distinction between actual and apprehended bias is that actual bias is about the state of mind of the principal, while apprehended bias is a judgement based on the state of mind of a hypothetical observer.⁴⁵⁵ Actual bias requires an assessment of the state of mind and actual views of a school principal, such as their views of homosexuals, single mothers, pregnant women, international students, etc. Actual bias will not be made apparent through suspicions, possibilities or other unofficial evidence. In the absence of guilt from the principal or a clear public statement of bias, actual bias will be difficult for a student, parent or staff member to establish.⁴⁵⁶ Thus, successful claims of actual bias remain rare. Similarly, cases have not settled exactly what is required for a review of a bias claim; however, statements from a principal that they are not biased will receive no weight.⁴⁵⁷ When a bias claim is made, this must be determined by reference to the whole of the circumstances of the case.⁴⁵⁸

A claim of apprehended bias does not require such strong or clear evidence, rather, the question is ‘one of possibility (real and not remote), not probability’.⁴⁵⁹ A court only needs to be satisfied that a fair minded and informed observer might conclude that the principal might not be impartial or approach the issues with an open mind. Any claim of apprehended bias is one of perception rather than actuality. An apprehension must still be soundly or reasonably based,⁴⁶⁰ and the bias need not be established in fact, its existence can just be a possibility. Principals should take some comfort in that courts have stressed that a claim of apprehended bias will not be upheld lightly.⁴⁶¹

⁴⁵³ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 652.

⁴⁵⁴ *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, 306 (French CJ).

⁴⁵⁵ *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 437–8 (Gummow ACJ, Hayne, Creenan and Bell JJ); *Spencer v Bamber* [2012] NSWCA 274, [16] (Basten JA).

⁴⁵⁶ *South Western Sydney Area Health Services v Edmonds* [2007] NSWCA 16, 97.

⁴⁵⁷ *Porter v Magill* [2002] 2 AC 357, 495.

⁴⁵⁸ *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, 518–19.

⁴⁵⁹ *Ebner v Official Trustee* (2000) 205 CLR 337, 345.

⁴⁶⁰ *Webb v R* (1994) 181 CLR 41, 88.

⁴⁶¹ *R v Lusink; Ex parte Shaw* (1980) 3 ALR 47, 50.

School principals should be careful in expressing their personal views as this may place a court in the difficult position of determining a personal or subjective nature to be made against the principal.⁴⁶² However, the courts have shown a tendency to apply a high evidentiary standard for claims of actual bias, and that conduct that is deemed less than desirable does not constitute actual bias.⁴⁶³ On the other hand, a court that upholds a claim of apprehended bias is not required to make an adverse finding that a reasonable observer might conclude that the principal might not be impartial and go no further. Similarly, in *CRU24 v DPP*,⁴⁶⁴ it was suggested that there was no requirement to go in-depth in an apprehended bias claim as it is the hypothetical observer's opinion that matters.

3.9.4 *The Hypothetical Observer in Determining Bias*

Principals are generally assumed to make decisions and perform their tasks objectively and without bias. However, if a claim of bias is made against a principal, the court will use a fictional member of the public to determine the bias claim. The qualities of the hypothetical observer are to be objective, reasonable and an exemplar of fairness.⁴⁶⁵ In *Johnson v Johnson*,⁴⁶⁶ Kirby J stated that an observer was a 'reasonable member of the public' and was 'neither complacent nor unduly sensitive or suspicious'. Hypothetical observers are expected to take a balanced approach to information and 'its overall social, political, or geographical context'.⁴⁶⁷ In recent times, the hypothetical observer will be given knowledge of the facts of the case and detailed knowledge of the education system in which principals operate, including the applicable law, policies and guidelines. In most instances it would be likely that this would be another principal; however, it may not always be.

3.9.5 *Interest in the Outcome*

Interest in matters extend beyond just the financial issues to include the stake the principal has in the outcome. Principals make decisions in the discharge of their wider duties and are not subject to such strict rules as court officials. The test to be applied to principals would be actual bias when they are involved in the investigation and discipline process.⁴⁶⁸ This gives principals

⁴⁶² *Spencer v Bamber* [2012] NSWCA 274, [16] (Basten JA).

⁴⁶³ *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98, [84] where the parts of the conduct of the primary judge were described variously as 'wrong headed ... inappropriate and regrettable' but not sufficient to find actual bias.

⁴⁶⁴ (2012) 83 NSWLR 385, 397.

⁴⁶⁵ *Raybos Australia Pty Ltd v Tectran Corp Pty Ltd* (1986) 6 NSWLR 272, 275.

⁴⁶⁶ (2000) 201 CLR 488.

⁴⁶⁷ *Helow v Secretary of State for the Home Department (Scotland)* [2008] 1 WLR 2416, 3.

⁴⁶⁸ *Wilson v RSL of Australia (Qld Branch)* [2006] QSC 376, 29.

the ability to decide matters in which they have laid charges⁴⁶⁹ or acted as witnesses.⁴⁷⁰ However, ‘the concept of interest is ... vague and uncertain’.⁴⁷¹ It may be possible for students, parents and teachers to argue on the category of interest as principals generally promote excellence in education (see Chapter 2 for the principals roles and responsibilities), and thus may have an interest in removing disruptive students, students with special needs or underperforming teachers from the school. Therefore, when addressing bias, principals should be cognisant of their interest in the outcome of the decision they make.⁴⁷² One issue that may be raised by the school community is interest by association; however, in *Yukon Francophone School Board, Education Area #23 v Attorney-General of the Yukon Territory*, the Supreme Court of Canada stated:

Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise.⁴⁷³

3.9.6 Principals Conduct

Principals may create an apprehension of bias by their conduct. The question about a principal’s conduct would be what fairness requirements are there in the circumstances of the case at hand.⁴⁷⁴ The rule against bias would seek to establish the impartiality applied in the given case that a principal was deciding.⁴⁷⁵ As principals are empowered to gather evidence (either directly or indirectly via a deputy principal), they may create an apprehension of bias if they do not reveal such material to the affected party.⁴⁷⁶ The suggestion for principals is to err on the side of caution, that is, to disclose the material and explain what impression it may have created. Aggrieved parties may be successful at establishing a bias claim if a principal is given irrelevant or inadmissible material.⁴⁷⁷ To prevent a claim of bias, it may be beneficial for the principal to make clear the procedural rules and expectations regarding conduct and apply those standards.

⁴⁶⁹ *R v Wadley; Ex parte Burton* [1976] Qd R 286, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017), 674.

⁴⁷⁰ *Hall v New South Wales Trotting Club Ltd* [1977] 1 NSWLR 378.

⁴⁷¹ *Ebner v Official Trustee* (2000) 205 CLR 337, 357.

⁴⁷² *Ndimeni v Meeg Bank Ltd* 2011 (1) SA 560.

⁴⁷³ [2015] 2 SCR 282, 316.

⁴⁷⁴ *Comaz (Aust) Pty Ltd v Commissioner of State Revenue* [2015] VSC 294, 26.

⁴⁷⁵ *Isbester v Knox City Council* (2015) 255 CLR 135, 149.

⁴⁷⁶ *Freedman v Petty* [1981] VR 1001, 1021, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 683.

⁴⁷⁷ *Hercules v Jacobs* (1982) 60 FLR 82, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 683.

3.9.7 Principals Prejudging the Decision

Principals are prohibited from prejudgement but not predispositions (predisposition in the legal context of schools is a school principal holding a particular position or view towards an issue, or acting in a particular way).⁴⁷⁸ As principals are the final decision-maker at the school level, parties may raise the issue that principals have previously decided matters concerning the same parties (eg long-term discipline issues). Principals may hold some degree of predisposition towards matters; however, it will be difficult for a party to show to what degree that predisposition has had on the decision until the principal states or does something. However, the courts have assumed that principals as educated members of society can rise above their predispositions to consider matters on their merits. An issue that principals may be confronted with is that they have decided one matter concerning a student, parent or teacher and are confronted with yet another matter involving the same student, parent or teacher. In *Isbester v Knox City Council*,⁴⁷⁹ his Honour stated that the decision-maker ‘can ordinarily be expected to have developed a frame of mind which is incompatible with the exercise of that degree of neutrality required dispassionately’ to determine a later case involving that same party. Principals may hold predispositions, as long as their views are not so strongly held as to prevent them from approaching issues with a fair measure of objectivity. The essential question is whether persuasion is a genuine possibility in the matter. The Western Australian Court of Appeal noted that:

The mere fact that a judge has previously decided cases adverse to a party does not provide a basis for a reasonable apprehension that the judge might not bring an impartial or unprejudicial mind to bear on the case at hand.⁴⁸⁰

Credibility of students, parents and even teachers may be called into question at times; however, predisposition will less likely be found if previous decision/s did not involve an adverse finding of the credibility of the individual. It is common practice for school principals to use template paragraphs when communicating decisions to affected parties,⁴⁸¹ and while the High Court has accepted the use of this practice for decisions on similar issues, it is not with an unlimited licence.⁴⁸² During their decision-making, principals may form an interim view of the likely outcome, but that will not support a finding of prejudgement.⁴⁸³ When hearing parties,

⁴⁷⁸ *Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507, 531.

⁴⁷⁹ (2015) 225 CLR 135, 157.

⁴⁸⁰ *MTI v SUL* [2012] WASCA 87, [14].

⁴⁸¹ *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

⁴⁸² *SZNRZ v Minister for Immigration and Citizenship* [2010] FCA 107, 6.

⁴⁸³ *AXQ15 v Minister for Immigration and Border Protection* [2016] FCAFC 73, 32.

principals may offer fairly direct language to students, parents or teachers; however, provided that the principals views can be changed subject to further argument or evidence, they are permitted.⁴⁸⁴ In *Kaycliff Pty Ltd v Australian Broadcasting Tribunal*, the court commented that:

Judges who demonstrate an ability to decide complex cases at the very end of the hearing can do so only because they have worked the problems out and formed conclusions, subject always to the possibility of their being changed by further evidence or argument, as they go along.⁴⁸⁵

When decision-making, principals must consider their demeanour as this may give rise to an apprehension of bias. Unfortunately, there is no hard and fast rule with respect to demeanour.⁴⁸⁶ Previous cases have demonstrated that it is insufficient to show bias by a decision-maker being irritated, impatient or using sarcasm.⁴⁸⁷ Even remarks made by a principal that would appear one sided would be insufficient to show bias, as this may be for some necessary reason.⁴⁸⁸ The courts are generally unwilling to accept that a principal has cast prejudgement because in their official capacity they made a decision in another matter.⁴⁸⁹ Similarly, prejudgement is unlikely to be found on the basis of decisions the principal has previously made. It is unlikely principals would be found biased simply because based on past performance they are likely to decide similar matters in the same manner.⁴⁹⁰

3.9.8 Association

Principals in some secondary schools may have connected relationships with people such as family members, social friendship groups or professional associations, which may support a claim for bias. Depending on the degree of friendship between the parties, this can disqualify a principal from deciding a matter;⁴⁹¹ for example, if the principal's child is involved in a discipline matter with another student. Unfortunately, there are no hard and fast rules to satisfy disqualification; however, the courts will consider the degree of intensity of the relationship. If a close relative is financially dependent upon the decision-maker then it may be difficult for the principal to separate the interests. This would apply to all circumstances involving a student

⁴⁸⁴ *Montedeen Pty Ltd v Bamco Villa Pty Ltd* [1999] VSCA 59.

⁴⁸⁵ *Kaycliff Pty Ltd v Australian Broadcasting Tribunal* (1989) 90 ALR 310, 317.

⁴⁸⁶ *Galea v Galea* (1990) 19 NSWLR 263, 281–2.

⁴⁸⁷ *Barakat v Goritsas (No 2)* [2012] NSWCA 36, 53–4.

⁴⁸⁸ *AQX15 v Minister for Immigration and Border Protection* [2016] FCAFC 73, 32.

⁴⁸⁹ *IOOF Australia Trustees Ltd v Seas Sapfor Forests Pty Ltd* (1999) 78 SASR 151.

⁴⁹⁰ *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30.

⁴⁹¹ *DJC v Burg* [1998] VSCA 139; *Duke Group Ltd (in liq) v Pilmer (No 3)* [2001] SASC 215, 52.

(principal's child), parent of a student with special needs (principal's child with special needs), or teacher (principal's spouse or child).

3.9.9 *Bias and Small-Town Exception*

School principals operate in an environment that would be considered in the exercise of government decision-making to be a relatively small community, which would carry a level of social and familiarity of the parties with it. School principals of even the largest public secondary schools in NSW operate in an environment of less than 2,000 students. As a principal has either direct or indirect contact with all pupils, it is likely that an argument could be raised over the small-town exception when the principal is undertaking the complex task of decision-making and allowing for the rules of procedural fairness. In *Trustees of Christian Brothers v Cardone*,⁴⁹² the majority of the court held that mere knowledge of the witnesses did not disqualify the judge, particularly if the judge lived in the same small community as the witnesses and parties to the proceedings. However, if comments were made regarding the credibility of witnesses, in the school context around student discipline, this may become problematic as students are not always truthful. Similar decisions have rejected bias claims on the basis of a small-town exception generally around the lawyer–judiciary relationship.⁴⁹³

3.9.10 *Exceptions and Limitations to the Rule Against Bias*

There are two main exceptions to the rule against bias. These are a waiver being provided by the affected individual, and the necessity for a principal to make a decision.

3.9.10.1 Waiver

Affected parties may be subject to a principal's decision multiple times, which may give rise to a possible claim for bias; however, the rule against bias can be waived by a party if they are aware of the possible bias. There is no precise time frame for an objection to be made as the bias may not be present until the case has continued for a sufficient period.⁴⁹⁴ The appropriate time for an affected party to object is as soon as the party becomes aware of the issue.⁴⁹⁵ The courts have been unwilling to support a waiver when gross bias is present, which states 'relevant

⁴⁹² (1995) 130 ALR 345.

⁴⁹³ *Grant v Teachers Appeal Tribunal (Jamaica)* [2006] UKPC 59, [38]; *Saxmere Co Ltd v Wool Disestablishment Board Co Ltd* [2010] 1 NZLR 35, 51, 70 ('*Saxmere*'), which may be distinguished from *Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd* (1996) 135 ALR 753, where a reasonable apprehension of bias did not exist due to the personal commitments of the judge and counsel in their investment as *Saxmere* had a significant level of direct involvement. *Attorney-General (NT) v Director of Public Prosecutions* [2013] NTCA 2.

⁴⁹⁴ *Vakauta v Kelly* (1989) 167 CLR 568, 579.

⁴⁹⁵ *Ibid* 579.

but not compelling ... even where the parties would consent to the judge sitting, if the judge, on balance, considers that disqualification is the proper course, then judge should so act'.⁴⁹⁶ This may equally apply to principals with the view that they could not be persuaded by the parties to change their mind. In *Kennedy v Cahill*,⁴⁹⁷ the Family Court concluded that the public interest in a fair hearing by an unbiased decision-maker can prevail over any waiver of the affected parties. *Johnson v Johnson*⁴⁹⁸ may be relevant to principals as decision-makers as in that case, Callinan J noted that bias may be the culminative result of many individual matters (which could extend over many years) and this might only become apparent when the decision is made to the affected parties.

3.9.10.2 Necessity for the Principal to Make the Decision

As the school principal is the final decision-maker at the school, which is what this thesis seeks to examine, the concept of necessity is most likely to prevail when there is no alternative to the decision-maker against whom bias is alleged.⁴⁹⁹ The concept of necessity may also apply if the decision-making function was delegated to a deputy principal as they too may suffer from the same complaint. It should be noted that for complex decisions where bias may be established, an external principal from the school may be requested to be the decision-maker; however, that process is beyond the scope of this thesis. Thus, where another body can determine the matter, the principal should not,⁵⁰⁰ and this is consistent with decisions for an alternative decision-maker to be appointed without significant difficulty or delay.⁵⁰¹ Despite not being the preferred option because the decision is now being taken out of the principal's hands, the claim of necessity is unlikely to be successful for principals because alternative arrangements are available within the NSW Department of Education, for example, a principal from a neighbouring school.

3.9.11 Remedy for a Breach of Bias

If a bias claim is made against a school principal, and this is ultimately upheld by a court or tribunal, the typical remedy is generally to set aside the decision. Thus, the decision would then

⁴⁹⁶ The Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (AIJA, 3rd ed, 2020), 3.5(g) <<https://aija.org.au/publications-introduction/guidelines/guide-to-judicial-conduct/>>.

⁴⁹⁷ (1995) 118 FLR 60.

⁴⁹⁸ (2000) 201 CLR 488, 517–19.

⁴⁹⁹ *Knight v Wise* [2014] VSC 76, 78–9.

⁵⁰⁰ *Sidney Harrison Pty Ltd v City of Tea Tree Gully* (2001) 112 LGERA 320, 326.

⁵⁰¹ *Jones v Architects Board of Western Australia* [2004] WASC 219, 38.

be made by another principal within the NSW Department of Education, or by the DEL not subjected to the claimed bias.

3.9.12 *Rule against Bias Summary*

The rule against bias therefore requires the principal ‘to have a sufficiently open mind about issues which come before them to promote public confidence in public sector decision-making’.⁵⁰²

3.10 REASONS FOR THE DECISION

There is generally not a duty for a school principal to give the reasons behind their decision; however, in *Osmond v Public Service Board*, Kirby P explained the benefits of a duty to provide reasons as:

- An affected individual can be empowered to examine whether any appealable or reviewable error has been committed by the principal. This may assist the individual to make an informed decision whether to appeal or not.
- Good decision-making in government schools cannot win support unless it is accountable to those who it affects.
- Giving reasons can make school principals decisions more robust because public scrutiny may apply.⁵⁰³

The added benefit of providing reasons is that school principals may be more careful and rational when decisions are made public (at least in so far as to the affected individual). When there is an obligation to provide a reason, this may lead to the development of institutional processes for producing reasons where the principal bases their decision on precedent or having someone else write the reasons.⁵⁰⁴ The effect of this is that fairness may not have been applied in totality because procedural fairness is based on the circumstances of the case. However, drafting reasons is time consuming, expensive and distracts the principal from their main function, which is the provision of an excellent standard of education (see Chapter 2 for the principal’s roles and responsibilities), so the task becomes one of a balance. Similarly, there is ‘a growing expectation that persons affected by administrative conduct will know why they

⁵⁰² Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 702.

⁵⁰³ [1984] 3 NSWLR 447, 463, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 626.

⁵⁰⁴ *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314.

have been so affected’;⁵⁰⁵ however, there may be instances in the school environment where the disclosure of confidential information is inappropriate. An aggrieved party could seek an order from the courts to obtain the reasons for a principal’s decision. This was the issue in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*⁵⁰⁶ where a party could either challenge an unexplained decision or first seek an order that reasons be given. In *Campbelltown City Council v Vegan*, Basten JA stated that the problems ‘which arise when pursuing judicial review in the absence of reasons ... cannot by themselves, provide a justification for implying an obligation to give reasons’.⁵⁰⁷ If a principal is compelled to give reasons, the failure to observe a statutory duty to provide reasons will only give rise to a remedy to order the production of reasons rather than setting the decision aside.⁵⁰⁸ Thus, principals may not have a general duty to give reasons, but good government decision-making would suggest best practice is to provide reasons for their decision. The principals’ decisions do not need to be perfect or exhaustive⁵⁰⁹ and the reasons should explain the process of logic by which the principal reached their conclusions⁵¹⁰ and they should not be lengthy or overly technical,⁵¹¹ and the reasons not being expressly referred to in a given topic does not mean that the decision-maker has not considered them.⁵¹² *Minister for Immigration and Citizenship v Li*⁵¹³ requires decision-makers to explain adequately some of their procedural steps; however, how much must be explained is unknown. It is useful to note that the NSW Department of Education in the *Suspension and Expulsion of School Students: Procedures 2011*⁵¹⁴ and *Legal Issues Bulletin 5 Student Discipline in Government Schools*⁵¹⁵ require a written record of the issue and action be recorded.⁵¹⁶ School principals should be conscious of their wording, and describe facts, parties and final decisions in a professional manner.⁵¹⁷

⁵⁰⁵ *L & B Linings Pty Ltd v WorkCover Authority of NSW* [2012] NSWCA 15.

⁵⁰⁶ (2003) 216 CLR 212, 242–3.

⁵⁰⁷ (2006) 67 NSWLR 372, 393–4.

⁵⁰⁸ *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 500.

⁵⁰⁹ *Inghams Enterprises Pty Ltd v Lakovska* [2014] NSWCA 194, 2.

⁵¹⁰ *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 501–2.

⁵¹¹ *Inghams Enterprises Pty Ltd v Lakovska* [2014] NSWCA 194, 2.

⁵¹² *Ashby v Commonwealth of Australia* [2021] FCA 40.

⁵¹³ (2013) 249 CLR 332.

⁵¹⁴ NSW Government, Department of Education and Communities, *Suspension and Expulsion of School Students: Procedures 2011* <https://policies.education.nsw.gov.au/policy-library/associated-documents/suspol_07.pdf>.

⁵¹⁵ NSW Government, Department of Education, ‘Student Discipline in Government Schools’, *Legal Issues Bulletins and Guidelines* (Web Page) <<https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/bulletin-5-student-discipline-in-government-schools>>.

⁵¹⁶ Tryon Francis, ‘Principals, Alternative Dispute Resolution, and Procedural Fairness in Australian Public Schools’ (2020) 23 *International Journal of Law and Education* 85, 89.

⁵¹⁷ CCH, *Australian School Principals Legal Guide* (updated 8 April 2020).

In *Minister for Immigration and Citizenship v SZMDS* ('SZMDS'),⁵¹⁸ Crennan and Bell JJ explained that almost all federal decision-makers must now give a written statement of their material findings of fact and the evidence they relied upon to support their reasons for the decision. There seems no reason why the principle from *SZMDS*⁵¹⁹ should not apply to school principals and decision-makers when determining outcomes surrounding student discipline, special education and industrial relations because the school principal has to engage in the process of reasoning to make the findings on the material facts before them. Crennan and Bell JJ stated:

The complaint of illogically or irrationality was said to lie in the process of reasoning. But the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.⁵²⁰

3.11 REASONABLENESS OF THE DECISION

In reviewing a decision, the Ombudsman, tribunals and courts will generally focus on the reasonableness of the decision from the decision-maker (the school principal). The reviewing authority is likely to consider the following elements in determining if a decision is reasonable:⁵²¹

- the school principal had the legal power to make the decision and the decision was made in good faith, honestly, for the proper purpose and on relevant grounds in accordance with the NSW Department of Education policies;
- the matter in which the principal is investigating has merits;
- the evidence presented on the facts of the case gives rise to an intelligible justification from the school principal;
- the reasoning used by the school principal was valid, logical and rational;
- the response was proportionate and appropriate weight was given to relevant factors;
- the school principal was impartial and managed any conflicts of interest;

⁵¹⁸ (2010) 240 CLR 611 ('SZMDS').

⁵¹⁹ Ibid.

⁵²⁰ Ibid 648.

⁵²¹ Chris Wheeler, 'What is Fair and Reasonable Depends a Lot on your Perspective' (2014) 22 *Australian Journal of Administrative Law* 63.

- there was consistency with previous decisions or actions made in similar circumstances;
- the decision was made in a timely manner and if not, they provided justification as to why there was a delay;
- the conduct of the school principal or decision-maker and the approach taken was appropriate;
- the information provided to the parties was relevant and timely;
- the policies, procedures and practices employed by the NSW Department of Education were accessible, clear and implemented in a timely manner; and
- the outcome or decision made by the principal was fair, consistent and proportional to the matter.

A school principal should attempt to apply the above criteria when undertaking a decision-making process. The issue arising here is that reasonableness in the circumstances would vary considerably from one school to the next and therefore applying what is considered to be reasonable in one context may not be appropriate in another.

3.12 RIGHT OF APPEAL AND REVIEWING A DECISION

The test whether the processes are open to review is considered in *R v Criminal Injuries Compensation Board; Ex parte Lain*.⁵²² If a decision is open to review is determined on whether a step leading to the final decision has the power to adversely affect a person's rights, interests or legitimate expectations. In *Minister for Local Government v South Sydney City Council*,⁵²³ Spigelman CJ identified the challenges that exist in multi-staged decision-making processes:

In some cases an appeal will cure any defect; in others procedural fairness will be required at both levels. There is an intermediate class of cases where 'a fair decision, notwithstanding some initial defect' will be upheld on the basis that 'there has been a fair result, reached by fair methods.'⁵²⁴

In *Attorney-General (NSW) v Quin*, Brennan J describes how a person who believes they have been denied procedural fairness may apply to the court for judicial review:

A term which conveniently describes jurisdiction of the Supreme Court of New South Wales to make orders relating to the exercise of executive or administrative power

⁵²² [1967] 2 QB 864, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017).

⁵²³ (2002) 55 NSWLR 381.

⁵²⁴ *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381, 387.

conferred on or vested in the Executive Government or some other instrumentality of the State.⁵²⁵

The decision must have affected them individually or specifically, and directly. *R v Ludeke; Ex parte Customs Officers' Association of Australia, Fourth Division* is authority that not everyone who suffers detriment as an indirect result of an order is entitled to be heard before the order is made. Gibbs CJ comments:

Orders made by [the Commission] may affect many members of the community who are not parties to the proceedings in question, but that does not mean that any members of the community who will be indirectly affected by an order of the [Commission] had a right to be heard in those proceedings.⁵²⁶

As a government school is a statutory body enacted by the *Education Act 1990* (NSW), if an officer of that Act (the school principal) makes a decision that adversely affects a person's (the student/child) rights, interests or legitimate expectations, the officer must ensure that the procedures utilised in making the decision are fair. In *Kioa*, Mason J said:

The expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.⁵²⁷

These rules are procedural in nature, in that they address the manner in which a decision is made rather than the merits of the decision itself.⁵²⁸ Any appeal on the grounds of procedural fairness is concerned with the fairness of the decision based on the procedure and not the actual decision.⁵²⁹ As a result, a traditional merits review is based on the procedure to reach the decision rather than the decision itself.⁵³⁰ Following the traditional approaches of natural justice, procedural fairness can be considered narrow in approach as it concerns the conduct of

⁵²⁵ (1990) 170 CLR 1, 26 (Brennan J).

⁵²⁶ *R v Ludeke; Ex parte Customs Officers' Association of Australia, Fourth Division* (1985) 155 CLR 513, 520.

⁵²⁷ *Kioa v West* (1985) 159 CLR 550, 585.

⁵²⁸ *Ibid* 622 (Brennan J); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 96.

⁵²⁹ *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160 (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

⁵³⁰ *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155, 1173 in which Lord Brightman states: 'Judicial review is concerned not with the decision, but with the decision-making process', cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 399.

the principal rather than the internal process of the principal in forming their decision.⁵³¹ In more recent decisions, there is no breach to the hearing rule if a decision-maker fails to hear a person who had no value to add or who had information that would have made no difference; this does not involve a breach of procedural fairness.⁵³²

3.12.1 *Judicial Review of NSW Department of Education Decisions*

A significant issue arises as to whether a decision by the NSW Department of Education that may affect an individual is amendable to judicial review. Although the NSW Department of Education is created by statute, the question as to whether the NSW Department of Education is exercising a public power is raised. In *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* ('Datafin'),⁵³³ the applicant sought judicial review of a decision of the Panel, which was a self-regulatory body that was created by statute and supported and sustained by a periphery statutory power. It was held that the Panel was amendable to judicial review. Lloyd LJ emphasised the importance of the source and nature of the power:

The source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: ... but in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. ... The essential distinction, which runs through all the cases ... is between a domestic or private tribunal on the one hand and a body of persons who were under some public duty on the other.⁵³⁴

There is a statutory provision which provides that a person who is aggrieved by a decision to which the Act applies may apply to the NSW Civil and Administrative Tribunal (Administrative and Equal Opportunity Division) to review the decision on the grounds that a breach of the rules of procedural fairness occurred in connection with the making of the decision in relation to the *Education Act 1990* (NSW).⁵³⁵ Under s 69 of the *Supreme Court Act 1970* (NSW),⁵³⁶ the court has the jurisdiction to intervene if there has been a denial of procedural fairness and to declare

⁵³¹ *Edwards v Kyle* (1995) 15 WAR 302, 322 (Owen J) who explained 'Procedural fairness is primarily concerned with the way in which the investigator gathers information and, in particular, the way in which he or she interacts with the parties likely to be affected in the process', cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 399.

⁵³² *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326.

⁵³³ (1987) 3 BCC 10 ('Datafin').

⁵³⁴ *Ibid* 29 (Lloyd LJ).

⁵³⁵ *Administrative Decisions Review Act 1997* (NSW).

⁵³⁶ *Supreme Court Act 1970* (NSW) s 69.

the decision invalid. The court may award relief in the nature of a prohibition, certiorari or mandamus. Therefore, in applying *Datafin*⁵³⁷ to the *Education Act 1990* (NSW), decisions made by school principals in NSW government schools that affect the rights of individuals are subject to judicial review.

The functions allocated to Division 3 of the NSW Civil and Administrative Tribunal give it jurisdiction to hear matters in relation to the *Education Act 1990* (NSW). The functions allocated to Division 3 are:

- 3 Functions allocated to Division
 - (1) The following functions of the Tribunal are allocated to the Division:
 - (a) the functions of the Tribunal in relation to the following legislation:
Education Act 1990 (NSW)
 - (b) any other function of the Tribunal in relation to legislation that is not specifically allocated to any other Division of the Tribunal by another Division Schedule for a Division.
 - (2) The functions allocated to the Division by subclause (1) include:
 - (a) any functions conferred or imposed on the Tribunal by statutory rules made under legislation referred to in that subclause, and
 - (b) any functions conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of proceedings for the exercise of functions allocated by that subclause (including the making of ancillary and interlocutory decisions of the Tribunal), and
 - (c) in relation to the exercise of administrative review jurisdiction in this Division—any functions conferred or imposed on the Tribunal by or under the *Administrative Decisions Review Act 1997* (NSW) in connection with the exercise of such jurisdiction.

3.13 FAIRNESS IN THE CONTEXT OF DECISION-MAKING IN SCHOOLS⁵³⁸

The view of the NSW Department of Education, parents, teachers, students and the wider community follows that of the famous adage in *R v Sussex Justices; Ex parte McCarthy*⁵³⁹ that ‘justice must not only be done but must also be seen to be done’. Improving decision-making and promoting public confidence are two concepts that Australian courts have long recognised as vital for government departments. The High Court has focused on the procedural nature⁵⁴⁰

⁵³⁷ *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* (1987) 3 BCC 10.

⁵³⁸ This section is an extract of the published work found in Tryon Francis, ‘Principals, Alternative Dispute Resolution, and Procedural Fairness in Australian Public Schools’ (2020) 23 *International Journal of Law and Education* 85. The work was also submitted in the course LAWS8116 Dispute Management for partial completion of the Master of Laws degree at The Australian National University.

⁵³⁹ [1924] 1 KB 256, 259 (Lord Hewart CJ).

⁵⁴⁰ *Kioa v West* (1985) 159 CLR 550, 583–5 (Mason J), 662 (Brennan J); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 21–6 (McHugh and Gummow JJ), 48 (Callinan J); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; *SZBEL v Minister for Immigration and Multicultural*

of procedural fairness and it appears unlikely to change its approach. Participation in decision-making is an example of sound decision-making because it may improve the quality of administrative processes and consequential decisions.⁵⁴¹

Decisions often need to be made quickly in the school context. Examples include suspension or exclusion of students for misconduct, enrolment and provision for a student with special needs, or the removal of a staff member from the school site for misconduct. The term fairness cannot be defined; instead, it is determined by reference to the factual circumstances of the case applying the statutory framework, and is accepted when a commonly understood standard is applied.⁵⁴² The difficulty is in determining the standard to be applied when there are 811,000 students and 2,200 schools (approximately 400 secondary government schools) in New South Wales. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*,⁵⁴³ Gleeson CJ balanced the relevant issues to decide whether fairness can be defined in any particular case; however, the court often balances those various factors in a fairly intuitive manner without any further explanation.⁵⁴⁴ Considering the facts of the case is a relatively straight forward concept; however, balancing the elements to determine a fair outcome in the school context is complex and challenging.⁵⁴⁵

Government school decision-makers (principals) have a duty to observe procedural fairness when making decisions that affect an individual's rights or interests in a direct and immediate way.⁵⁴⁶ A fair hearing must be given to an individual in the school context a student, parent or teacher, which means the individual has understood the proceedings before them and they have had ample opportunity to be heard.⁵⁴⁷ The common law will fill any omission on the legislation or rules under which a decision-maker is acting in providing procedural fairness,⁵⁴⁸ as the *Education Act 1990* (NSW) is silent on displacing the presumption that the rules of procedural

and Indigenous Affairs (2006) 228 CLR 152, 160 (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ); *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 177.

⁵⁴¹ Paul P Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford University Press, 1990).

⁵⁴² Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 491–2.

⁵⁴³ (2003) 214 CLR 1.

⁵⁴⁴ Tryon Francis, 'Principals, Alternative Dispute Resolution, and Procedural Fairness in Australian Public Schools' (2020) 23 *International Journal of Law and Education* 85.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Kioa v West* (1985) 159 CLR 550.

⁵⁴⁷ *Anderman v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2011) 213 FCR 345.

⁵⁴⁸ *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, cited in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 398.

fairness should apply.⁵⁴⁹ As a matter of statutory interpretation, there is a common law implication for a requirement to afford procedural fairness to persons whose interests may be adversely affected by the exercise of government power.⁵⁵⁰

There is almost always a duty to observe procedural fairness in the exercise of public education, allowing for all of the facts of the individual case and the limits of the school principal's decision-making authority.⁵⁵¹ Brennan J identified that the rules of procedural fairness are 'chameleon-like'⁵⁵² and Mason J stated that procedural fairness should 'adopt fair procedures which are appropriate and adapted to the circumstances of the particular case'.⁵⁵³

The NSW Department of Education released a legal issues bulletin on procedural fairness, which makes the following observations:

While it is generally preferable for the functions of investigating and decision making to be carried out by different people, in small schools this may not always be possible. If one member of staff is conducting both the investigative and decision-making stages, he or she must be particularly careful to be seen as reasonable and objective. Ultimately, the decision maker must act justly and be seen to act justly.⁵⁵⁴

Aggrieved individuals have a line of appeal that can be checked by a superior officer as there is an internal hierarchical appeal process within the NSW Department of Education. Procedural fairness applies in NSW government schools as The *Education Act 1990* (NSW) makes no provisions that procedural fairness would be excluded when dealing with an individual's rights. The courts accept that legislation may exclude or limit the requirements of neutrality and fairness in the exercise of discretionary powers by administrative officials such as school principals.⁵⁵⁵ Interpretive principles of statutes regarding whether an exclusion applies to any of the rules depends on the meaning of the legislation.⁵⁵⁶ *Waga v Technical & Further*

⁵⁴⁹ *Kioa v West* (1985) 159 CLR 550.

⁵⁵⁰ *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 97 (Gummow, Hayne, Creenan and Bell JJ).

⁵⁵¹ *Waga v Technical & Further Education Commission* [2009] NSWCA 213; Tryon Francis, 'Principals, Alternative Dispute Resolution, and Procedural Fairness in Australian Public Schools' (2020) 23 *International Journal of Law and Education* 85.

⁵⁵² *Kioa v West* (1985) 159 CLR 550, 612 (Brennan J).

⁵⁵³ *Ibid* 585 (Mason J).

⁵⁵⁴ NSW Government, Department of Education, 'Procedural Fairness in the Department of Education', *Legal Issues Bulletins and Guidelines* (Web Page) <<https://www.education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/procedural-fairness>>.

⁵⁵⁵ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; *Plaintiff S10/2011* (2012) 246 CLR 636.

⁵⁵⁶ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

Education Commission,⁵⁵⁷ affirmed that there is a common law requirement of procedural fairness being applied to government school decision-making, which supports a progressive extension to the range of decisions where the rules of procedural fairness apply subjected to any legislative intent. In the Australian context, an ‘intuitive’⁵⁵⁸ approach is preferred, founded on the principle standard to avoid ‘practical injustice’⁵⁵⁹ and that ‘reasonable and fair procedure’⁵⁶⁰ applies.

3.13.1 *Fairness Model in NSW Department of Education Decisions*

NSW government secondary school principals make decisions or form opinions on whether conduct is fair based on personal assessments, which are influenced by factors such as perceptions, attitudes, opinions, interests, personal biases, past experiences, education, other socio-demographic differences and even their personality.⁵⁶¹ There are four dimensions of any decision-making process:⁵⁶²

1. decision/outcomes — the perceived fairness of decisions or outcomes of the process;
2. procedures — the perceived fairness of the means by which decisions are made;
3. treatment — the perceived fairness of the treatment of the individual concerned; and
4. information — the perceived fairness of the information provided to the person concerned, explaining the procedures used and the decision/outcome.

If an aggrieved person perceives that one of the above elements of the process is not fair, the impact can vary depending on the severity of the outcome. For example, a student suspended for three days for bringing a knife to school may accept the adverse finding against them while still feeling aggrieved; however, a parent seeking to send their child to a special needs school may escalate the administrative procedures if their child’s needs are not met and no reasonable explanation is provided.

⁵⁵⁷ [2009] NSWSC 213.

⁵⁵⁸ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) [8.10].

⁵⁵⁹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 13–14.

⁵⁶⁰ *Kioa v West* (1985) 159 CLR 550, 627 (Brennan J).

⁵⁶¹ Chris Wheeler, ‘What is Fair and Reasonable Depends a lot on Your Perspective’ (2014) 22 *Australian Journal of Administrative Law* 63.

⁵⁶² *Ibid.*

3.14 CONCLUSION

The doctrine of procedural fairness where the rights of individuals are likely to be affected is now engrained in Australian common law as a fundamental right unless a statute expressly excludes the rights to procedural fairness. Australian government school principals make decisions that affect people's lives, in varying degrees, every day. Broadly speaking, as a government school principal is making a decision on behalf of the State of New South Wales, they must observe the rules of procedural fairness. Procedural fairness consists of two basic principles: the hearing rule and the rule against bias. The hearing rule provides an applicant with the opportunity to be heard in a fair manner before a decision affecting their educational opportunities is made. The individual must be notified of any hearing and be given the opportunity to respond. The rule against bias provides that the school principal must not be biased, which may be difficult at times when dealing with the same person (student, parent or teacher) for many years. The school principal must make their decision based on actual evidence, as opposed to speculation or a whim.⁵⁶³ This extends to the duty of a school principal/administrator in that they must afford procedural fairness in the making of the decision where the rights, interests and legitimate expectations⁵⁶⁴ of a student, parent or teacher are affected, subjected to any statutory intent to displace the fundamental right, which is absent in the *Education Act 1990* (NSW). As a consequence, all government school principals (not just secondary school principals as discussed in this thesis) are subjected to the requirements of procedural fairness in the decision-making process where a student's, parent's or teacher's fundamental rights are to be affected. It is thus imperative that a school principal understands the rules of procedural fairness so that any decision they make can withstand administrative review on the grounds of the hearing rule or the rule against bias, so that their decisions are upheld with integrity and confidence is maintained at the school.

The problem is that school principals are given no formal training surrounding the processes they are to undertake when decision-making and they may be required to undertake an investigation with little support or guidance. As a consequence, provided that the school principal or decision-maker arrived at a decision affecting an individual in a reasonable, logical and fair manner, then a small breach of the rules of procedural fairness would not make their decision invalid.

⁵⁶³ *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41.

⁵⁶⁴ *Kioa v West* (1985) 159 CLR 550.

This chapter has presented the administrative law elements of procedural fairness and the application of those rules to the government school context in decision-making. The elements of the hearing rule and the rule against bias are applied in the educational context to provide an understanding of how school principals can apply the rules of procedural fairness in their decision-making processes. The following chapter sets out the methods applied in the study to answer the research questions. It outlines both a case study and a qualitative methodological approach of inquiry.

CHAPTER 4

RESEARCH DESIGN

4.1 INTRODUCTION

The purpose of this study was to explore the working knowledge of secondary government school principals in New South Wales on the application of the rules of procedural fairness in their decision-making. The purpose of Chapter 4 is to present the methodological framework that guided this research. This is achieved through an explanation of research design, research inquiry, methodology, data collection, coding and analysis. The chapter will provide an explanation for the selection of the qualitative methodologies presented.

4.2 RESEARCH METHODOLOGY

Research methods are commonly described as being either quantitative or qualitative. Quantitative methods are number based; for example, surveys that provide a score with questions such as ‘How many principals are responsible for more than 100 teaching staff?’. Qualitative methods are word based; for example, interviews with questions such as ‘How do principals feel about their teaching staff?’. There are varied definitions of qualitative research. Merriam described qualitative research as follows: ‘Qualitative researchers are interested in understanding the meaning people have constructed, that is, how people make sense of the world and the experiences they have in the world.’⁵⁶⁵ And Denzin and Lincoln described qualitative research as follows:

Qualitative research is a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that makes the world visible. These practices transform the world. They turn the world into a series of representations, including field notes, interviews, conversations, photographs, recordings, and memos to the self. At this level, qualitative research involves an interpretive, naturalistic approach to the world. This means that qualitative researchers study things in their natural settings, attempting to make sense of, or to interpret, phenomena in terms of the meanings people bring to them.⁵⁶⁶

The research approach in this study can be described as basic qualitative research through a single case study where the knowledge is constructed based on participants’ experiences with

⁵⁶⁵ Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, rev ed, 2009) 13.

⁵⁶⁶ Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 3rd ed, 2005) 3.

the aim of uncovering and interpreting these meanings. Consistent with Merriam's qualitative research approach, the overall aim was to understand the lived experience through interpreting participants' experiences, how the participants interpreted their world, and what meaning they attributed to their experiences.⁵⁶⁷ As the research was a bounded system (the application of procedural fairness in decision-making in the NSW Department of Education with a finite number of possible participants, ie 400 government secondary school principals and approximately 40 education lawyers) the study is most appropriately classified as a qualitative case study with the findings being richly descriptive.

4.3 CASE STUDY

Case study methodology is described as an in-depth exploration from multiple perspectives of the richness and complexity of a particular social unit, system or phenomenon. Its primary purpose is to gain knowledge and inform professional practice and policy development.⁵⁶⁸ Creswell and Poth⁵⁶⁹ summarised qualitative case study as exploring a real-life, contemporary bounded case over time, through detailed, in-depth data collection involving multiple sources of information and reports a detailed case description and case themes. Furthermore, Creswell added that case study research is a process of qualitative research,⁵⁷⁰ which is distinguished and established in the empirical qualitative research domain.⁵⁷¹ Yin defined a case study as one that 'investigates a contemporary phenomenon in-depth within its real-life context, especially when the boundaries between the phenomenon and the context are not clearly evident'.⁵⁷² According to Bloomberg, a descriptive case study research approach is used when the researcher seeks to illustrate the specifics of a social phenomenon or issue that is not well conceptualised or understood.⁵⁷³ The use of various data-gathering techniques is to seek rich detail regarding the inner processes of the given case, and to provide multiple ways of understanding the layers of meaning inherent in the case.⁵⁷⁴ A case study may be considered a suitable approach when the

⁵⁶⁷ Sharan B Merriam and Elizabeth J Tisdell, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 4th ed, 2016) 24.

⁵⁶⁸ Ibid 23; Linda Dale Bloomberg, 'Case Study Method' in Bruce B Frey (eds), *The SAGE Encyclopaedia of Educational Research, Measurement, and Evaluation* (SAGE Publications, 2018) 237.

⁵⁶⁹ John W Creswell and Cheryl N Poth, *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (SAGE Publications, 4th ed, 2018).

⁵⁷⁰ John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (SAGE Publications, 2nd ed, 2003) 8, 14.

⁵⁷¹ Ibid.

⁵⁷² Robert K Yin, *Case Study Research: Design and Methods* (SAGE Publications, 5th ed, 2014) 16.

⁵⁷³ Linda Dale Bloomberg, 'Case Study Method' in Bruce B Frey (eds), *The SAGE Encyclopaedia of Educational Research, Measurement, and Evaluation* (SAGE Publications, 2018) 237.

⁵⁷⁴ Ibid.

researcher has a clearly identifiable and bounded case and seeks to achieve in-depth knowledge and understanding of the case context. This research used a case study methodology in examining a single organisation, as it was arguably the most appropriate design research and methodology supported by several recent researchers.⁵⁷⁵

Leading case study scholars⁵⁷⁶ have argued that a single in-depth qualitative case study research in educational organisations is the most appropriate research design and methodology. Case study research as defined by Yin is an in-depth practical investigation of a current event in the real-life context and may include activities, events, situations and processes concerning people's behaviour.⁵⁷⁷ Others such as Merriam commented that case study research maintains deep connections to core values and intentions and is particularistic, descriptive and interrogative.⁵⁷⁸ Finally, Stake defined case study research as an investigation and analysis of a single or collective case that is intended to capture the complexity of the object of study.⁵⁷⁹

Case study methodology in the field of qualitative research is described as a significant qualitative strategy because the focus of the research occurs in a bounded system or case.⁵⁸⁰ A case study approach is popular amongst researchers as the methodology allows for flexibility

⁵⁷⁵ John W Creswell and Cheryl N Poth, *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (SAGE Publications, 4th ed, 2018); Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 5th ed, 2018); Bent Flyvbjerg, 'Case Study' in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 4th ed, 2011) 301; Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 3rd ed, 2009) 39; Nicolaj Siggelkow, 'Persuasion with Case Studies (2007) 50(1) *Academy of Management Journal* 20; Gary Thomas, 'A Typology for the Case Study in Social Science following a Review of Definition, Discourse, and Structure' (2011) 17(6) *Qualitative Inquiry* 511; Malcolm Tight, 'The Curious Case of Case Study: A Viewpoint' (2010) 13(4) *International Journal of Social Research Methodology* 329; Robert K Yin, *Case Study Research and Applications: Design and Methods* (SAGE Publications, 6th ed, 2017).

⁵⁷⁶ John W Creswell and Cheryl N Poth, *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (SAGE Publications, 4th ed, 2018); Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 5th ed, 2018); Bent Flyvbjerg, 'Case Study' in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 4th ed, 2011) 301; Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 3rd ed, 2009) 39; Nicolaj Siggelkow, 'Persuasion with Case Studies (2007) 50(1) *Academy of Management Journal* 20; Gary Thomas, 'A Typology for the Case Study in Social Science following a Review of Definition, Discourse, and Structure' (2011) 17(6) *Qualitative Inquiry* 511; Malcolm Tight, 'The Curious Case of Case Study: A Viewpoint' (2010) 13(4) *International Journal of Social Research Methodology* 329; Robert K Yin, *Case Study Research and Applications: Design and Methods* (SAGE Publications, 6th ed, 2017).

⁵⁷⁷ Robert K Yin, *Case Study Research and Applications: Design and Methods* (SAGE Publications, 6th ed, 2017).

⁵⁷⁸ Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 3rd ed, 2009).

⁵⁷⁹ Robert E Stake, *The Art of Case Study Research* (SAGE Publications, 1995).

⁵⁸⁰ John W Creswell and Cheryl N Poth, *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (SAGE Publications, 4th ed, 2018); Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 5th ed, 2018); Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 3rd ed, 2009) 39.

in the qualitative approach,⁵⁸¹ and a number of distinguished scholars have added to the development of case study methodology.⁵⁸² The case study approach is useful when ‘a how and why question is being asked about a contemporary set of events, over which the investigator has little or no control’.⁵⁸³ Case study research is considered an appropriate methodology if the researcher determines that people give certain meaning to real-life situations, organisational processes, situations and actions as well as the processes by which these actions, events and situations take place.⁵⁸⁴

The intent of case study methodology has two elements, namely, that it is both a process of inquiry and a product of that inquiry. The thesis attempts to satisfy both elements as the case study undertook a process of inquiry (see Chapter 5 for research findings) and produced series of recommendations (solutions) to address the paucity of school principals understanding of procedural fairness (see Chapter 6 for recommendations).

4.3.1 *Single-Case Study Design*

There are two types of case studies: a single case study and a multiple case study. Consistent with Yin,⁵⁸⁵ if a single organisation is studied, a single case study approach is preferred. As such, a single case study was selected for this study, that of the NSW Department of Education. Had the research examined government departments of education from different states and attempted to compare the similarities and differences between these different educational systems, then a multiple case study approach would have been more appropriate.

Yin described five rationales for case study design: critical, unusual, common, revelatory and longitudinal.⁵⁸⁶ The common case study design was selected as it was initially thought that school principals struggled with the application of procedural fairness in their decision-making.

⁵⁸¹ Gary Thomas, ‘A Typology for the Case Study in Social Science following a Review of Definition, Discourse, and Structure’ (2011) 17(6) *Qualitative Inquiry* 511.

⁵⁸² John W Creswell and Cheryl N Poth, *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (SAGE Publications, 4th ed, 2018); Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 5th ed, 2018); Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 3rd ed, 2009) 39; RE Stake, *The Art of Case Study Research* (SAGE Publications, 1995); Robert K Yin, *Case Study Research and Applications: Design and Methods* (SAGE Publications, 6th ed, 2017).

⁵⁸³ Robert K Yin, *Case Study Research: Design and Methods* (SAGE Publications, 5th ed, 2014) 14.

⁵⁸⁴ Jennifer Mason, *Qualitative Researching* (SAGE Publications, 1996) 129; Aikaterini Argyrou, ‘Making the Case for Case Studies in Empirical Legal Research’ (2017) 13(3) *Utrecht Law Review* 95, 100.

⁵⁸⁵ Robert K Yin, ‘How to do Better Case Studies: (With Illustrations from 20 Exemplary Case Studies)’ in Leonard Bickman, Debra J Rog and Samuel J Best (eds), *The SAGE Handbook of Applied Social Research Methods* (SAGE Publications, 2nd ed, 2009) 254.

⁵⁸⁶ Robert K Yin, *Case Study Research: Design and Methods* (SAGE Publications, 5th ed, 2014) 52.

This was ascertained from personal experience, analysis of cases publicly available from court reports and from professional learning seminars. The objective of a common case is to capture the circumstances and conditions of an everyday situation to shed light on an issue.⁵⁸⁷ Merriam suggested that insights gained from case studies can directly influence policies, procedures and future research.⁵⁸⁸ Consistent with Yin, undertaking case study research involves conducting an empirical investigation of a contemporary phenomenon within its natural context using multiple sources of evidence.⁵⁸⁹

Prior to adopting the qualitative research approach, this study recognised the potential disadvantages of qualitative research such as subjectivity and personal bias, as commented by leading authors on case study research.⁵⁹⁰ To address these biases, triangulation of the information was achieved through multiple sources of evidence from two distinct groups of interviewees, professional learning programs and cases. Furthermore, Merriam added that qualitative research is naturalistic, draws on multiple methods that respect participants in the study, focuses on natural context, is emergent and evolving, and is fundamentally interpretative.⁵⁹¹ As such, it was determined that a single case study qualitative research strategy was deemed the most appropriate for an in-depth study of an individual educational organisation with a unique structure, such as a state government run education system.

The case study used in this research can be described as an instrumental case study as the intent was to understand a specific issue, problem or concern, and a case, in this instance a single government department, was used to better understand this problem.⁵⁹² Stake described an instrumental case study as being ‘examined mainly to provide insight into an issue or to redraw a generalisation. The case is of secondary interest, it plays a supportive role, and it facilitates our understanding of something else.’⁵⁹³ The instrumental case study often seeks to understand

⁵⁸⁷ Ibid.

⁵⁸⁸ Sharan B Merriam, *Qualitative Research and Case Study Applications in Education* (Jossey-Bass, 1998).

⁵⁸⁹ Dawson R Hancock and Bob Algozzine, *Doing Case Study Research: A Practical Guide for Beginning Researchers* (Teachers College Press, 2016) 15.

⁵⁹⁰ John W Creswell and Cheryl N Poth, *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (SAGE Publications, 4th ed, 2018); Gary Thomas, ‘A Typology for the Case Study in Social Science following a Review of Definition, Discourse, and Structure’ (2011) 17(6) *Qualitative Inquiry* 511; Robert K Yin, *Case Study Research and Applications: Design and Methods* (SAGE Publications, 6th ed, 2017).

⁵⁹¹ Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 3rd ed, 2009).

⁵⁹² Linda Dale Bloomberg, ‘Case Study Method’ in Bruce B Frey (eds), *The SAGE Encyclopaedia of Educational Research, Measurement, and Evaluation* (SAGE Publications, 2018) 237.

⁵⁹³ Robert E Stake, ‘Case Studies’ in Norman K Denzin and Yvonna S Lincoln (eds) *Strategies of Qualitative Inquiry* (SAGE Publications, 2003), 137.

one specific issue or problem and a case is selected to understand this problem⁵⁹⁴ and is examined with the lens to give insight into a wider issue.⁵⁹⁵ In summary, the instrumental case study looks at a single issue or concern and then selects one bounded case to illustrate the issue.

4.3.2 Case Study in Legal Research

The application of case study methodology is ‘relatively underused in empirical legal research’.⁵⁹⁶ The application of case study methodology in empirical legal research could provide analysis on how legislation is ‘understood’, ‘applied’ or ‘misapplied’, ‘subverted’, ‘complied with’ or ‘rejected’, which can influence law-related disciplines.⁵⁹⁷ Case study research offers an advantage in that it can investigate a legal problem or phenomenon where the answer may not lie in the analysis of legal proceedings or court reported cases. One of the key strengths of case study research is that it examines the way in which the participants view the world and within the case. Case studies are capable of providing ‘powerful human-scale data on macro-political decision-making, fusing theory and practice’.⁵⁹⁸ An example is in the current research that has sought to gain an understanding of the application of the rules of procedural fairness in decision-making by school principals, which seldom presents in reported legal cases. Applying a case study design provides an opportunity to collect and verify responses from alternative sources of data using the technique of triangulation rather than just legislation and case law to report on the issues.⁵⁹⁹

4.4 CHARACTERISTICS OF CASE STUDY DESIGN

Leading authors have identified several characteristics that define case study research: defined boundaries, design flexibility, thick narrative description, thematic analysis and transferability.⁶⁰⁰

⁵⁹⁴ John W Creswell, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (SAGE Publications, 3rd ed, 2013).

⁵⁹⁵ Keith F Punch and Alis Oancea, *Introduction to Research Methods in Education* (SAGE Publications, 2014).

⁵⁹⁶ Lisa Webley, ‘Stumbling Blocks in Empirical Legal Research: Case Study Research’ [2016] (October) *Law and Method* 1, 2.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Routledge, 6th ed, 2010) 255.

⁵⁹⁹ Terry CM Hutchinson, *Researching and Writing in Law* (Lawbook, 3rd ed, 2010) 104; Lisa Webley, ‘Stumbling Blocks in Empirical Legal Research: Case Study Research’ [2016] (October) *Law and Method* 1, 3.

⁶⁰⁰ Johan W Creswell and Cheryl N Poth, (n 544); Bent Flyvbjerg, ‘Case Study’ in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Publications Handbook of Qualitative Research* (SAGE Publications, 4th ed, 2011) 301; Lorna Hamilton and Connie Corbett-Whittier, *Using Case Study in Education Research* (SAGE Publications, 2013); Robert E Stake, *The Art of Case Study Research* (SAGE Publications, 1995);

4.4.1 *Defined Boundaries*

Yin advocated the importance of defining the boundaries of the case to ensure it is manageable for the researcher.⁶⁰¹ The researcher needs to identify a specific case that is typically current, real-life, in progress and relevant.⁶⁰² The parameters of the case must be predetermined so that data can be collected within the parameters of the case study. To ensure that the case is clearly defined, boundaries such as the left and right of the arc are required for the sources of enquiry to investigate the specific phenomenon.⁶⁰³ Other boundaries may include the geographical area, time, cost and research instrument. The research began with defining one state government educational organisation (the NSW Department of Education) and identifying one issue, that is, the role of the school principal as decision-maker in applying the rules of procedural fairness into their decisions around student discipline, special education and industrial relations. The government secondary school principals and education lawyers (internal and external to the NSW Department of Education) are used to define the boundaries of the case.

4.4.2 *Design Flexibility*

Consistent with case study methodology, there cannot be a reliance on a single source of data to gain the necessary in-depth understanding and insight.⁶⁰⁴ The data collection method was through interviews and the examination of cases, documentation (NSW Department of Education policies, procedures and guidelines), professional learning programs and formal education law courses. In selecting the data collection methods, the researcher needs to consider how the type of data meets the research intent and questions.

4.4.3 *Thick Narrative Description*

Case study research is richly descriptive because it is grounded in deep and varied sources of information. It employs quotes from key participants, anecdotes, and narratives composed from the original interviews and other data sources to create meaning that seeks to understand the complexity of the variables inherent in the phenomenon being studied.⁶⁰⁵ To enable a deep

Gary Thomas and Kevin Myers, *The Anatomy of the Case Study* (SAGE Publications, 2015); Robert K Yin, *Case Study Research and Applications: Design and Methods* (SAGE Publications, 6th ed, 2017).

⁶⁰¹ Robert K Yin, *Qualitative Research from Start to Finish* (Guilford Publications, 2nd ed, 2015).

⁶⁰² John W Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (SAGE Publications, 3rd ed, 2013) 98.

⁶⁰³ Robert K Yin, *Qualitative Research from Start to Finish* (Guilford Publications, 2nd ed, 2015).

⁶⁰⁴ John W Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (SAGE Publications, 3rd ed, 2013) 98.

⁶⁰⁵ J Amos Hatch, *Doing Qualitative Research in Education Settings* (Sunny Press, 2002).

understanding on the part of the reader, the key to understanding the data is for the researcher to provide a thick narrative description of the case, including the current context, history, chronology of events and a day-to-day rendering of the activities of the case.⁶⁰⁶ The role of the researcher in case study methodology is to articulate the lessons learnt from the case, which is achieved through thick narrative description and analysis to reach conclusions to the research questions and being able to explain the meanings behind the findings.

4.4.4 *Thematic Analysis*

The cases of a study are referred to as the units of analysis,⁶⁰⁷ in this instance, interview data. The research questions identified school principals and education lawyers as the focal point to determine the knowledge and application of the rules of procedural fairness, which corresponds to the unit of analysis. This study focused on the day-to-day decision-making that school principals make in accordance with the rules of procedural fairness and their perceptions on these decisions. Through thematic coding and analysis, the researcher attempts to provide an understanding of the complexity of the case and a basis for comparisons. The aim of thematic analysis is for a detailed description of each case to prevail as well as comparing the similarities and differences between cases. Cruzes et al⁶⁰⁸ identified that thematic analysis can develop as the data is collected and analysed from the case, and interpretation of these findings is required to present the results.

4.4.5 *Transferability*

One of the outcomes from case study methodology is that the data is obtained through a complex, intense, in-depth exploration, meaning the findings from one case may have transferable information and knowledge that can be applied in similar government contexts. This is relevant to this case study as the role of a school principal as decision-maker is similar to those in other government departments, such as the Australian Defence Force, Department of Home Affairs, Department of Social Services, Department of Health, Australian Federal Police, Australia Post, etc,⁶⁰⁹ hence the case study provides practical knowledge that is reflective of and responsive to its environment.

⁶⁰⁶ Linda Dale Bloomberg, 'Case Study Method' in Bruce B Frey (eds), *The SAGE Encyclopaedia of Educational Research, Measurement, and Evaluation* (SAGE Publications, 2018) 237.

⁶⁰⁷ Robert K Yin, *Qualitative Research from Start to Finish* (Guilford Publications, 2nd ed, 2015).

⁶⁰⁸ Daniela S Cruzes, Tore Dybå, Per Runeson and Martin Höst, 'Case Studies Synthesis: A Thematic, Cross-Case, and Narrative Synthesis Worked Example' (2015) 20(6) *Empirical Software Engineering* 1634.

⁶⁰⁹ Australian Government, *Government Department and Agencies* (Web Page)

4.4.6 Rigour in Qualitative Research

Qualitative data collection raises the questions of integrity, quality, reliability and consistency. Merriam and Creswell and Poth have commented that trustworthiness and reliability of qualitative research are a way to provide integrity in qualitative research.⁶¹⁰ Therefore, the two criteria for assessing a qualitative study are trustworthiness and authenticity. Leading authors have suggested trustworthiness in qualitative research is comprised of four criteria, which this qualitative single case study research addressed:⁶¹¹

- credibility (internal validity);
- transferability (external validity);
- data dependability (reliability); and
- confirmability (objectivity).

According to Stake, single case studies can provide convincing data to test theories, as long as the unique features or attributes of the case meet the study objectives.⁶¹² The use of both NSW government secondary school principals and NSW education lawyers in this qualitative case study also introduces the concept of data triangulation through multiple sources of information, which increases the study's validity and reliability of the data collected, as supported by literature.⁶¹³

Using a combined qualitative case study as a research design is one of the most difficult research methodologies in social science research,⁶¹⁴ 'especially when the researcher has, as a priority, the desire to collect, present and analyse data at an acceptable quality level, and bring the qualitative case study to a logical conclusion by writing a compelling qualitative case study

<https://www.directory.gov.au/departments-and-agencies>.

⁶¹⁰ Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 2009); John W Creswell and Cheryl N Poth, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (SAGE Publications, 4th ed, 2018).

⁶¹¹ Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 4th ed, 2011); Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 2009); John W Creswell and Cheryl N Poth, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (SAGE Publications, 4th ed, 2018).

⁶¹² Robert E Stake, *The Art of Case Study Research* (SAGE Publications, 1995).

⁶¹³ Robert K Yin, *Case Study Research and Applications: Design and Methods* (SAGE Publications, 6th ed, 2017).

⁶¹⁴ Ibid.

report'.⁶¹⁵ Furthermore, the researcher needs to openly acknowledge the strengths and limitations of case study research as a specific research design in the given context.⁶¹⁶

4.5 DATA COLLECTION METHODS

The data collected in this study was personally collected by the researcher in the form of semi-structured interviews at the participant's workplace, with the exception of one interview at a coffee shop and one interview in the researcher's office. The process by which the data was collected is outlined below.

4.5.1 Recruitment — School Principals

One of the research intentions was to sample several government secondary school principals in metropolitan NSW. There are 399–401 government secondary schools in NSW as published by the NSW Department of Education. Given the geographical nature of New South Wales, sampling secondary school principals from all regions presents numerous problems, such as accessibility of the school location; the cost of fuel, accommodation and airline tickets; the time required to travel to the school; and the ability for the principal to remain anonymous. As such, a sample was selected from NSW metropolitan schools within a 50 kilometre radius of the Sydney CBD.

Recruitment was achieved by doing a secondary school search of schools in the Sydney metropolitan area on the NSW Department of Education website. On 12 August 2019, 112 NSW government secondary school principals were invited to participate in the research via an email sent to the generic school email, as per NSW Department of Education protocol. Following a poor response rate (one response), personal letters were sent to 20 secondary school principals on 22 August 2019, after which two principals agreed to participate and were interviewed at their school. Follow-up phone calls were made to the remaining 18 school principals on 14 October 2019; however, none of the school principals were willing to participate. One principal who was known to the researcher was approached to participate in

⁶¹⁵ HJ Gaya and EE Smith, 'Developing a Qualitative Single Case Study in the Strategic Management Realm: An Appropriate Research Design' (2016) 7(2) *International Journal of Business Management and Economic Research* 529, 533.

⁶¹⁶ John W Creswell and Cheryl N Poth, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (SAGE Publications, 4th ed, 2018); Nicolaj Sigelkow, 'Persuasion with Case Studies' (2007) 50(1) *Academy of Management Journal* 20; Robert K Yin, *Case Study Research and Applications: Design and Methods* (SAGE Publications, 6th ed, 2017).

the research, and they agreed. A total of four NSW government secondary school principals participated in the study.

4.5.2 *Recruitment — Directors, Educational Leadership*

Following the government secondary school principals' interviews, it was identified that Directors, Educational Leadership (DELs) were an integral part of principal decision-making. As such, DELs were identified through a colleague of the researcher who worked as an assistant principal at a NSW government primary school and was able to identify DELs in the target area (Sydney) via an online system. A total of seven (7) DELs were contacted via their NSW Department of Education email, with a response rate of one (1) DEL agreeing to participate.

4.5.3 *Recruitment — Employee Performance and Conduct Directorate Member*

The EPAC member was recruited by examining publicly available documents (court documents, policy documents, media releases, etc) and emailing the member directly. The EPAC member agreed to participate and was subsequently interviewed at the NSW Department of Education Head Office in Parramatta. To ensure anonymity, no further information can be provided about the EPAC member.

4.5.4 *Response Rate — Principals and Directors, Educational Leadership*

Principals receive over 100 requests annually to be involved in research, some of which can be onerous on the principal and school. Therefore, it was no surprise that the response rate from NSW government secondary school principals was low. Research conducted by Newlyn⁶¹⁷ on schoolteachers and the law in 2006 also identified government schoolteachers' willingness to participate in education law research as a challenge. Similarly, the Tedeschi review,⁶¹⁸ which was commissioned by the NSW Government in March to June 2019, relied on more than 150 written submissions and 40 interviews from several stakeholder groups, including school principals, about their experience with EPAC. As this report was commissioned shortly before the interviews for this research, the principals may have felt they had already had their say or they gave the commissioned report preference over a PhD study. Similarly, the NSW Public Secondary Schools Principal's Association made submissions to EPAC and no doubt, they had

⁶¹⁷ David J Newlyn, 'The "Legalisation" of Education: A Study of New South Wales Teachers and their Professional Development Needs in the Area of Law' (PhD Thesis, University of Wollongong, 2006) 106.

⁶¹⁸ Mark Tedeschi AM QC, *Review into the Functions and Operations of the Employee Performance and Conduct Directorate (EPAC) within the New South Wales Department of Education* (Final Report, June 2019) <<https://www.education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/media/documents/EPAC-Report-2019-Final-Secured.pdf>>.

sourced information and feedback from their members. In early 2020, the COVID-19 pandemic struck Australia, and schools were instructed by the Secretary of the NSW Department of Education that only essential visitors to the school and department sites were permitted. Thus, no further interviews could take place in 2020–2021.

4.5.5 *Recruitment — Education Lawyers*

The recruitment of education lawyers took two distinct approaches. Firstly, in-house NSW Department of Education lawyers were identified from the researcher's interactions with the ANZELA conference in Hobart, Tasmania in 2013. The researcher preliminarily identified the lawyers for the study and informally spoke to one of the lawyers to see whether they would be interested in being involved in the research. In addition, the researcher also had dealings with some NSW Department of Education lawyers when undertaking work as a lawyer at a private law firm in NSW in 2012. The in-house lawyers for the NSW Department of Education suggested other in-house lawyers (snowball effect) for the researcher to contact and provided email addresses where appropriate. A total of four in-house lawyers were invited to participate in the study, and a total of four in-house lawyers were interviewed.

The second group of lawyers who undertake work on behalf of the NSW Department of Education were identified by a variety of methods, including:

- informal conversations with a partner at one of the law firms that worked on cases for the NSW Department of Education;
- informal conversations with presenters at ANZELA presentations and conferences;
- publicly published information from LawSense and Legalwise on School Law Conferences with a list of presenters (lawyers);
- a research supervisor who was well connected with the legal practice in education law; and
- publicly available websites listing law firms that practised education law.

Five private law firms were identified and the researcher searched firm websites to identify the practice group leaders in each of these private law firms. Emails were sent to each of the practice group leaders (partners) in education law to ascertain if they would be interested in being involved in the research via a semi-structured audio recorded interview. On reviewing a published decision, one barrister who represents teachers was contacted by email and then

interviewed in chambers. In total, eight education lawyers were interviewed: four in-house and four external to the NSW Department of Education.

4.6 SEMI-STRUCTURED INTERVIEWS

The data was collected through 14 semi-structured interviews (eight lawyers, four principals, one DEL and one EPAC member). Some authors have argued that the best way to find out about people's experience and understanding of a concept is to simply ask them.⁶¹⁹ The rich narrative of people telling their own stories should be encouraged rather than discouraged. Therefore, an appropriate data collection method for this research that is consistent with this view is semi-structured interviews. Bernard⁶²⁰ recommends that during a semi-structured interview, the interviewer has a paper-based interview schedule that they should follow, and Bryman⁶²¹ argued that the researcher should be fully conversant with the schedule. As discussions may diverge in semi-structured interviews as they often contain open-ended questions, it is preferable to record interviews and later transcribe these recordings for analysis. By recording the interviews, this assists the researcher to build rapport with the interviewee and concentrate on what is being said, tone and body language. The same initial questions were asked of each participant group as the researcher used a set of interview questions (see Appendix A). Follow up questions were asked based on issues raised and comments made by the participants. The 14 semi-structured interviews were recorded with the informed written consent of all participants and then independently transcribed by a third party. The transcripts were as complete as possible and reviewed by the researcher. The transcripts cannot be perfect; however, for qualitative research they serve the purpose at hand and capture sufficient detail for the type of analysis carried out.⁶²² The transcripts were consistent with the recommendations in producing a complete as possible record of the interview, and the participants were invited to read over the final transcripts to increase the validity of the transcripts.⁶²³

Informal conversational interview, general interview and standardised open-ended interview are three basic approaches to collecting qualitative data through open-ended questions.⁶²⁴ Different strategies exist for the preparation, conceptualisation and instrumentation for each of

⁶¹⁹ Lyn Yates, *What Does Good Education Research Look Like?: Situating a Field and its Practices* (McGraw-Hill Education, 2004).

⁶²⁰ Bernard, H Russell, *Research Methods in Cultural Anthropology* (SAGE Publications, 1988).

⁶²¹ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012) 217.

⁶²² David Silverman, *Doing Qualitative Research: A Practical Handbook* (SAGE Publications, 2nd ed, 2005).

⁶²³ Ibid.

⁶²⁴ Michael Quinn Patton, *Qualitative Evaluation Methods* (SAGE Publications, 1980) 197.

the approaches.⁶²⁵ Preparation considers the setting, purpose of interview, terms of confidentiality, format of the interview, and research ethics.⁶²⁶ Conceptualisation is a process of defining the agreed meaning of the language used in a study.⁶²⁷ Instrumentation considers the design and development of innovative techniques for data collection and can involve questionnaires, surveys, focus groups, observations, or interviews.⁶²⁸ In this research, only semi-structured interviews were used; this is further expanded on below.

The benefits of a semi-structured interview technique include:⁶²⁹

- in-depth information can be obtained from open-ended responses;
- interview questions can be prepared prior to the interview, allowing the researcher to be prepared and appear competent;
- encourages two-way communication;
- allowing participants the freedom to respond in a flexible way;
- follow up questions can be asked; and
- provides qualitative data that can be compared to improve reliability.

The researcher had a paper-based set of questions to be followed, with a different set for each participant group, namely, the government secondary school principals and the education lawyers. The interviews were digitally recorded and later independently transcribed by a third party prior to analysis. The interview process was facilitated through a variety of face-to-face settings including the school principals' offices, NSW Department of Education worksites, private law firms or barrister chambers, the researcher's office and a coffee shop. A total of 14 interviews were conducted.

The interviews were transcribed verbatim from recordings. Each interview transcript was checked by the researcher by replaying the interview recording and confirming that the transcript was accurate. Where parts of the interview were inaudible, this was recorded as [inaudible] in the interview transcript.

⁶²⁵ Ibid.

⁶²⁶ John W Creswell, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (SAGE Publications, 3rd ed, 2013) 163-165.

⁶²⁷ Michael Quinn Patton, *Qualitative Evaluation Methods* (SAGE Publications, 1980) 197.

⁶²⁸ Michael Quinn Patton, *Qualitative Evaluation Methods* (SAGE Publications, 1980) 197; Garry George Claxton, 'Occupational Health and Safety: Generating Regulatory Perceptions to Encourage Compliance' (PhD Thesis, Curtin University, 2017) 34.

⁶²⁹ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012).

4.6.1 *Vignette Scenarios*

The vignette scenarios were presented as a hypothetical, the content of which was based on past legal cases that contained the requirement of procedural fairness, however, no party names were provided. Vignettes have been identified by Barter and Renold for three main purposes in social research:⁶³⁰

- people's judgements can be clearly articulated;
- behaviours in context can be explored; and
- allows an exploration of sensitive matters in a less personal and therefore less threatening way.

Vignettes have the potential to 'provide a further, often rich, source of data.'⁶³¹ Wilks states: 'Vignettes have long been used to study attitudes, perceptions, beliefs and social norms within social science and are simulations of real events depicting hypothetical situations.'⁶³² The use of a vignette in a semi-structured interview provides several advantages, including:⁶³³

- any perceived lack of knowledge can be reduced as the vignettes disguise the procedural fairness focus of the question;
- as there is no correct or incorrect answer, vignettes can ascertain a response in line with a person's decision making values;
- 'yes' or 'no' responses are avoided as participants are required to discuss their process to a given situation; and
- obtaining an explanation about a decision in relation to the vignette.

As aforementioned, the vignettes used in the research were modelled on real legal cases in educational institutions. These are situations where participants may not be aware of a legal precedent or may be unsure what to do from a procedural fairness (administrative law) perspective. For example, if a decision is overturned or a principal has erred and the matter is

⁶³⁰ Christine Barter and Emma Renold, 'The Use of Vignettes in Qualitative Research' (1999) 25(9) *Social Research Update* 1; Garry George Claxton, 'Occupational Health and Safety: Generating Regulatory Perceptions to Encourage Compliance' (PhD Thesis, Curtin University, 2017) 36.

⁶³¹ David J Fritzsche, 'Personal Values: Potential Keys to Ethical Decision Making' (1995) 14(11) *Journal of Business Ethics* 909; Garry George Claxton, 'Occupational Health and Safety: Generating Regulatory Perceptions to Encourage Compliance' (PhD Thesis, Curtin University, 2017) 36.

⁶³² Tom Wilks, 'The Use of Vignettes in Qualitative Research into Social Work Values' (2004) 3(1) *Qualitative Social Work: Research and Practice* 78, 80.

⁶³³ Ibid; Garry George Claxton, 'Occupational Health and Safety: Generating Regulatory Perceptions to Encourage Compliance' (PhD Thesis, Curtin University, 2017) 36.

settled, is it possible that the truth of the application of the rules of procedural fairness may never be told, and an opportunity to learn to prevent similar situations is lost.

Participants from the NSW government secondary school principal participant group were given the vignettes. The vignettes encouraged participants to use their knowledge and understanding of the decision-making process using the rules of procedural fairness to provide answers to the three vignettes. A sample of the vignette can be found in Appendix B.

4.7 DATA ANALYSIS

Regarding data analysis, the qualitative single case study research followed the recommendations of several leading case study researchers who proposed relevant strategies for data analysis.⁶³⁴ The data analysis phase included data presentation, discussion and interpretation. Working from the interview transcripts and guided from the themes, the NSW government secondary school principals and education lawyers formed the basis of the interpretation of the conceptual understanding of the rules of procedural fairness. The data collected from the qualitative case study research is presented in Chapter 5, along with key categories and data themes.

Transcribing the interviews was the first stage of analysis. The transcripts were completed independently of the researcher by a third-party professional transcript service, which offered complete confidentiality. The subsequent data was managed through QSR NVivo version 12 software to code overarching themes, sub-themes and categories, thus assisting the researcher to uncover emergent attributes of the central phenomenon of identifying procedural fairness perceptions that may hinder the school principal from applying administrative law principles.

4.8 CODING

Coding is the process that allows the researcher to develop conceptual abstraction, which develops theory.⁶³⁵ Substantive coding is when the data is fractured and analysed through a process of open coding to develop core categories.⁶³⁶ The core categories and related concepts

⁶³⁴ Robert K Yin, *Case Study Research and Applications: Design and Methods* (SAGE Publications, 6th ed, 2017); John W Creswell and Cheryl N Poth, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (SAGE Publications, 4th ed, 2018); Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 3rd ed, 2009).

⁶³⁵ Judith A Holton, 'The Coding Process and its Challenges' in Antony Bryant and Kathy Charmaz (eds), *The SAGE Handbook of Grounded Theory* (SAGE Publications, 2012) 265.

⁶³⁶ Ibid.

are then exposed to theoretical sampling and selective coding to reach a point of theoretical saturation.⁶³⁷ Theoretical saturation is achieved when no new themes or data emerge in the research.⁶³⁸ Coding and analysis occur simultaneously through a process of conceptual memoing, which assists the research in developing the key ideas.⁶³⁹ Memoing is thought to occur in two distinct phases: 1) substantive coding, which is the initial process where the researcher sorts the data into broad themes; and 2) when the researcher explores in greater detail the conceptual themes that are developing through theoretical saturation and theoretical coding, collapsing broad themes.

The conceptualisation of thematic analysis is achieved through core categories emerging, which is achieved through an analysis from the descriptive to the conceptual level.⁶⁴⁰ This requires the researcher to trust their instincts and be confident in delimiting data collection and coding, which ensures the ‘concepts that emerge are from the data and not the data per se’.⁶⁴¹

4.8.1 Coding Process

Conceptual codes are the relationship between data and theory to move from the empirical level by fracturing the data. To explain what is happening in the data, the fractured data is then conceptualised to provide a set of empirical indicators. Theoretical categories are developed from constant analysed and coded data through a comparative process to give a condensed and abstract view with scope.

Qualitative paradigm leading scholars such as Charmaz,⁶⁴² Goulding,⁶⁴³ Partington,⁶⁴⁴ Patton⁶⁴⁵ and Strauss and Corbin⁶⁴⁶ have put forth strategies and guidelines for the coding process, which require the qualitative researcher to battle with ‘both chaos and control’.⁶⁴⁷

⁶³⁷ Ibid.

⁶³⁸ Ibid.

⁶³⁹ Ibid.

⁶⁴⁰ Ibid.

⁶⁴¹ Ibid.

⁶⁴² Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (SAGE Publications, 2006).

⁶⁴³ Christina Goulding, *Grounded Theory: A Practical Guide for Management, Business and Market Researchers*. (SAGE Publications, 2002).

⁶⁴⁴ D Partington (ed), *Essential Skills for Management Research* (SAGE Publications, 2002).

⁶⁴⁵ Michael Quinn Patton, *Qualitative Research & Evaluation Methods* (SAGE Publications, 3rd ed, 2002).

⁶⁴⁶ Anselm Strauss and Juliet M Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (SAGE Publications, 2nd ed, 1998).

⁶⁴⁷ Judith A Holton, ‘The Coding Process and its Challenges’ in Antony Bryant and Kathy Charmaz (eds), *The SAGE Handbook of Grounded Theory* (SAGE Publications, 2012) 265, 273.

The chaos is in tolerating the uncertainty and subsequent regression of not knowing in advance and of remaining open to what emerges through the diligent, controlled, often tedious application of the method's synchronous and iterative processes of line-by-line coding, constant comparison for interchangeability of indicators, and theoretical sampling for core emergence and theoretical saturation.⁶⁴⁸

There are two phases in the coding process, 'initial coding' and 'focused coding;' however, coding is not a linear process.⁶⁴⁹ Initial coding takes the lead in the initial coding process; however, as the study develops, focused coding becomes the primary focal point of data analysis. To remain open to numerous analytical possibilities, constant changing of the codes to best fit the data occurs throughout the analysis phase. Such a process develops codes into more elaborate codes and key themes. Through the process of focused coding, the researcher examines and decides which codes best capture what is happening in the data and raise these codes up to become themes/conceptual categories, often identifying relationships between the themes.⁶⁵⁰ Figure 2 displays the coding process used in this study.

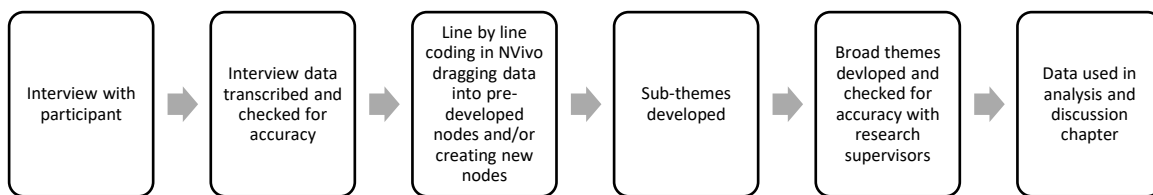


Figure 2: The coding process used in data analysis

The process of coding conducted in this study is consistent with that of leading scholars, which is thought to sustain the researcher's theoretical sensitivity. This requires the researcher to undertake the following steps in the coding process:

1. The transcripts are coded line-by-line comparing incidents to each other in the data; the data is coded in every possible way and questions are asked of the data. Glaser⁶⁵¹ developed the following questions:
 - a. 'What is this data a study of?'

⁶⁴⁸ Ibid.

⁶⁴⁹ Kathy Charmaz, Robert Thornberg and Elaine Keane, 'Evolving Grounded Theory and Social Justice Inquiry' in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 5th ed, 2018) 424.

⁶⁵⁰ Kathy Charmaz, *Constructing Grounded Theory* (SAGE Publications, 2014).

⁶⁵¹ Barney G Glaser, *Doing Grounded Theory: Issues and Discussions* (Sociology Press, 1998) 140.

- b. ‘What category does this incident indicate?’
 - c. ‘What is actually happening in the data?’
 - d. ‘What is the main concern being faced by the participants?’
 - e. ‘What accounts for the continual resolving of this concern?’
2. Line-by-line coding requires the researcher to verify and saturate categories, minimises missing important categories, and ensures relevance by generating codes with emergent fit to the study.
 3. To ensure constant stimulation of conceptual ideas it is essential in basic qualitative case study research that researchers do their own coding.

Pattern recognition is an integral part of the coding process and as subsequent data is collected and coded within the pre-existing nodes, this gives confidence to the researcher with respect to their coding abilities and in many situations, where to collect subsequent data.⁶⁵²

The study generated 12 tree (eight from the principal participants and four from the lawyer participants) and 115 sub-nodes (62 from the principal participants and 53 from the lawyer participants) nodes through open coding of data collected between July 2019 and March 2020; several of these codes were highly descriptive and in some instances, repetitive. This is consistent with other novice researchers in that as the study develops, so does the coding competency of the researcher.⁶⁵³ This is done so the researcher does not omit any concepts that may emerge from line-by-line coding and run the risk of missing a key concept relevant to the emerging theory.

As coding and early conceptual development is performed as the study progresses, once a category has reached data saturation, the researcher ceases to collect redundant data in that category.⁶⁵⁴ This approach assists with theoretical sensitivity as the researcher is actively engaged with coding and analysing the data. Furthermore, the conceptual ideas develop through constant comparison as the study progresses.

⁶⁵² Judith A Holton, ‘The Coding Process and its Challenges’ in Antony Bryant and Kathy Charmaz (eds), *The SAGE Handbook of Grounded Theory* (SAGE Publications, 2012) 265, 276.

⁶⁵³ Judith A Holton, ‘Rehumanising Knowledge Work through Fluctuating Support Networks: A Grounded Theory’ (PhD Thesis, University of Northampton, 2006).

⁶⁵⁴ Judith A Holton, ‘The Coding Process and its Challenges’ in Antony Bryant and Kathy Charmaz (eds), *The SAGE Handbook of Grounded Theory* (SAGE Publications, 2012) 265, 278.

Holton⁶⁵⁵ identified three types of comparison for the coding process. Primary coding compares incidences to generate concepts and hypotheses. Secondary coding compares emerging concepts to further incidences generating new theoretical properties and further hypotheses. Tertiary coding compares emergent concepts to each other drawing potential concepts and indicators developing hypothesis to become key concepts.⁶⁵⁶

The process of theoretical sampling requires the researcher to decide which data to collect and where to find the data to develop key concepts. As such, apart from deciding where to collect the initial data, further collection cannot be planned until some of the initial data has been collected and coded for conceptual themes and saturation of the codes achieved.⁶⁵⁷ As the researcher collects data, the codes are adjusted to ensure the data's relevance to the emerging theory is accurate.⁶⁵⁸ In this study, the researcher coded two pilot interviews (Principal Axel and Lawyer Ares) from 2014 to develop initial codes and categories prior to undertaking additional interviews and coding. When subsequent interviews were undertaken with Lawyer Boyd and Principal Beau in 2019, their interview data was coded using these developed codes, which generated similar and additional codes and led to the codes and conceptual themes of the study.

To achieve saturation, relevance and workability, the researcher is required to undertake significant time with the data to code and analyse the data to verify a category. When analysing the data, the researcher is required to seek similarities, differences and consistency of meaning between the indicators. This generates a coded category in which codes are polished to achieve best fit while other concepts are confirmed and saturated. Theoretical saturation occurs when through the coding process no new properties or dimensions occur through constant comparison. This allows the key concepts to be raised above the descriptive level and theoretical propositions (hypotheses) to be developed.⁶⁵⁹

⁶⁵⁵ Ibid.

⁶⁵⁶ Ibid 265, 278.

⁶⁵⁷ Ibid 278.

⁶⁵⁸ Barney G Glaser and Judith Holton, 'Remodelling Grounded Theory' (2004) 5(2) *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research* Art 4, 51.

⁶⁵⁹ Barney G Glaser, *The Grounded Theory Perspective: Conceptualization Contrasted with Description* (Sociology Press, 2001) 192.

4.9 NVivo

The interviews were coded through thematic analysis⁶⁶⁰ using the qualitative data analysis software, NVivo12. One benefit of using computer-assisted qualitative data analysis software ('CAQDAS') is that the software takes over the physical task of writing marginal codes. The analyst must still interpret, code and retrieve their own data; however, NVivo takes over the manual labour involved.⁶⁶¹ The software does not do the analysis, rather it is a data management and querying system that supports the researcher to carry out the analysis by removing the limitations imposed by paper processing and human memory.⁶⁶² Another benefit of using CAQDAS is that it allows multiple kinds of data such as interviews, cases, reports, seminars, conferences and training materials to be located in one place. NVivo allows for a large amount of data to be stored and saves time in organising and documenting the data analysis steps.

It is important to share the researcher's background and experience when using NVivo to justify the research credibility. The researcher was able to document his competence and knowledge of NVivo through a variety of experiences including a two-day QSR International course at the University of Technology Sydney, which was taught by an expert in qualitative data analysis software, and an online learning module as part of the individual student purchased NVivo package, which allowed for self-paced learning.

4.9.1 *Interrogate Interpretations*

NVivo literature describes interrogate interpretations as establishing a sound and thorough inquiry into the data.⁶⁶³ In this study, it was determined that the use of case nodes would be an appropriate NVivo tool to use due to the number of participants.

4.9.2 *Case Nodes*

Case nodes provide a place to store data or themes that emerge as part of the analysis.⁶⁶⁴ The route by which coding is undertaken is known as nodes, which are defined as 'a collection of references about a specific theme, place, person or other area of interest'.⁶⁶⁵ When a document

⁶⁶⁰ Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77.

⁶⁶¹ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012) 591.

⁶⁶² Kristi Jackson and Pat Bazeley, *Qualitative Data Analysis with NVivo* (SAGE Publications, 3rd ed, 2019).

⁶⁶³ Carolyn J Siccama and Stacy Penna, 'Enhancing Validity of a Qualitative Dissertation Research Study by Using NVivo' (2008) 8(2) *Qualitative Research Journal* 91.

⁶⁶⁴ QSR International, *The NVivo workbook* (2012)

<<https://www.amazon.com/NVivo-Workbook-QSR-International/dp/B071R5KTBR>>.

⁶⁶⁵ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012) 596.

has been coded, the node will incorporate references to those portions of documents in which the code appears.⁶⁶⁶

When coding using NVivo, nodes or containers for themes within data sources are used to hold relevant coding information,⁶⁶⁷ or ‘references about a specific theme, place, person or other area of interest’.⁶⁶⁸ In NVivo, nodes can either be free nodes, which are independent with no clear logical connection with other nodes, or tree-nodes/sub-nodes, which allow for a hierarchical structure, moving from a general category at the top (tree node) to more specific categories (branch nodes) below.⁶⁶⁹ The hierarchical structure of tree nodes allows for organised coding and analysis.⁶⁷⁰ The interview transcripts were open coded; meaning the transcripts were read line-by-line to find ideas and text to code.⁶⁷¹ According to Siccama and Penna,⁶⁷² branch nodes allow for more in-depth analysis of the data.

4.9.3 *Education Lawyers*

There are multiple ways of creating nodes, both initially and as the project progresses. In this research, following one lawyer interview, a pre-set of case nodes was developed from the research questions. Subsequent tree-nodes/sub-nodes were created following the initial coding process and as the project progressed.

An example of this is the procedural fairness node, which asked the lawyers ‘How do principals make decisions in accordance with the rules of procedural fairness in the administration of NSW schools?’ Coding this question revealed seven branch-nodes representing the application of procedural fairness in decision-making at the school.

⁶⁶⁶ Ibid.

⁶⁶⁷ QSR International, *The NVivo workbook* (2012)
<<https://www.amazon.com/NVivo-Workbook-QSR-International/dp/B071R5KTBR>>.

⁶⁶⁸ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012) 570.

⁶⁶⁹ Carolyn J Siccama and Stacy Penna, ‘Enhancing Validity of a Qualitative Dissertation Research Study by Using NVivo’ (2008) 8(2) *Qualitative Research Journal* 91.

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid.

⁶⁷² Ibid.

Nodes					
Name	Files	References	Created On	Created By	
Areas of law		2	3	6/08/2019 4:37 PM	TWF
Procedural Fairness		6	18	6/08/2019 4:38 PM	TWF
Bias		2	6	24/09/2019 2:44 PM	TWF
Complexity		3	5	24/09/2019 2:52 PM	TWF
Hearing		1	3	5/11/2019 12:20 PM	TWF
Internal Review Processes		2	3	24/09/2019 2:50 PM	TWF
Quality of following procedural fairness		8	31	7/08/2019 11:41 AM	TWF
Relationships		3	5	24/09/2019 3:04 PM	TWF
Time Poor		4	8	24/09/2019 2:51 PM	TWF
Procedural Fairness Cases		1	10	7/08/2019 11:48 AM	TWF
Sources of Principals Legal Knowledge		3	5	7/08/2019 11:36 AM	TWF

Figure 3: An example of how NVivo was used in coding data from the lawyer interviews

4.9.4 School Principals

Consistent with the approach taken with the lawyers, an example of the coding process on the procedural fairness node that asked the principals ‘What knowledge do you have of the rules of procedural fairness as a principal that affects your decision-making?’ is outlined below. Coding of this question revealed nine branch-nodes representing the application of procedural fairness in decision-making at the school.

Nodes					
Name	Files	References	Created On	Created By	
Areas of Law		2	2	26/08/2019 6:01 AM	TWF
Knowledge of Law		4	10	26/08/2019 6:13 AM	TWF
Legal Directorate		2	3	28/09/2019 1:53 PM	TWF
Legal Problem Developing		4	10	13/09/2019 12:12 PM	TWF
Legal Training		4	8	26/08/2019 6:08 AM	TWF
Procedural Fairness		4	12	13/09/2019 11:58 AM	TWF
Challenges of Procedural Fairness		4	7	26/08/2019 6:18 AM	TWF
Compliance		3	5	13/09/2019 12:17 PM	TWF
Director Reviews		1	2	2/11/2019 3:07 PM	TWF
Experience with PF		4	6	13/09/2019 12:02 PM	TWF
Fairness		4	5	28/09/2019 2:22 PM	TWF
Frustration with PF		4	9	13/09/2019 11:59 AM	TWF
Humanistic		1	1	30/09/2019 3:14 PM	TWF
Positives of PF		2	2	13/09/2019 12:02 PM	TWF
Principal Support		3	4	13/09/2019 12:11 PM	TWF
Roles and Responsibilities		1	2	13/09/2019 10:59 AM	TWF
Vignettes & Examples in Interviews		0	0	13/09/2019 12:22 PM	TWF

Figure 4: An example of how NVivo was used in coding data from the principal interviews

4.10 VALIDITY AND RELIABILITY

Validity refers to how well the data measures what it was intended to measure.⁶⁷³ A simplistic criterion for judging validity could be in considering a study valid if it succeeds in solving the problems identified as the reasons for conducting the research.⁶⁷⁴ Reliability is a measure of how consistently the data measures what it is intended to measure. A study might be considered reliable if similar findings are produced when the same types of data are collected in similar contexts.⁶⁷⁵ Respondent validation is a process whereby a researcher provides the research participants with an account of their findings.⁶⁷⁶ The aim of this exercise is to seek corroboration of the account the researcher has arrived at.⁶⁷⁷

Validity and reliability in qualitative studies are not simple issues. There is no statistic that can be used to demonstrate the findings of the study are valid, instead other methods are used such as triangulation and inter-coder reliability.

4.10.1 *Triangulation*

Triangulation is a process by which findings from more than one independent data source are compared.⁶⁷⁸ If a study is to be considered reliable, the findings from the independent data sources should be similar in content. In this study, the issues identified by the principals should be consistent with those of the in-house legal officers, education lawyers and case law. If the issues identified by the principals, lawyers and case law are not consistent, then triangulation cannot occur. In any study attempting to validate using triangulation, there is a risk the data may not support one another. This does not make the data unreliable, but is a factor for the researcher to report on.

Data sources could be classified into the following groups:

- experiencing through direct observation, including taking field notes and permanent recordings;
- interviewing and questioning; and

⁶⁷³ Geoffrey E Mills, *Action Research: A Guide for the Teacher Researcher* (Merrill, 1999).

⁶⁷⁴ Keith F Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (SAGE Publications, 2nd ed, 2005).

⁶⁷⁵ David A Erlandson, Edward L Harris, Barbara L Skipper and Steve D Allen, *Doing Naturalistic Inquiry: A Guide to Methods* (SAGE Publications, 1993).

⁶⁷⁶ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012).

⁶⁷⁷ Ibid.

⁶⁷⁸ Ibid.

- examining information such as legal cases, policy documents, training programs and professional development.⁶⁷⁹

Interviews were conducted with NSW government secondary school principals and NSW education lawyers to ensure the conclusions made were an accurate representation of the procedural fairness decision-making process undertaken by the principals. When a triangulation exercise is undertaken, the possibility of a failure to corroborate findings always exists;⁶⁸⁰ however, if the findings do corroborate, the reliability of the findings is solid.

Triangulation is defined as cross-checking data from at least two points of perspective to consider research analysis.⁶⁸¹ Triangulation has traditionally been seen as a strategy for validation through ‘the combination of methodologies in the study of the same phenomenon’.⁶⁸² Denzin described triangulation as a concept of ‘sophisticated rigor’ in data analysis.⁶⁸³ Similarly, Flick described triangulation as ‘a strategy on the road to a deeper understanding of an issue under study and thus as a step to more knowledge and less toward validity and objectivity in interpretation’.⁶⁸⁴ In undertaking case study research through an interview strategy, Lüders and Reichertz commented that the ‘maxim to do justice to the respondent in all phases of the research process as far as possible’ should be in the forefront of the researcher’s mind.⁶⁸⁵ The aim of triangulation is to develop a deeper and broader understanding of research questions through multiple approaches, which could include contradictions in the findings, but still promote quality in research.⁶⁸⁶ Flick noted that triangulation is of relevance when studying social problems and matters of social justice through qualitative inquiry.⁶⁸⁷

⁶⁷⁹ Jane Mills, Ann Bonner and Karen Francis, ‘The Development of Constructivist Grounded Theory’ (2006) 5(1) *International Journal of Qualitative Methods* 25.

⁶⁸⁰ Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012).

⁶⁸¹ Flick Uwe, ‘Triangulation’ in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 5th ed, 2018) 444, 444.

⁶⁸² Norman K Denzin, *The Research Act: A Theoretical Introduction to Sociological Methods* (McGraw-Hill, 1978) 291, cited in Flick Uwe, ‘Triangulation’ in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 5th ed, 2018) 444, 445.

⁶⁸³ Norman K Denzin, *The Research Act* (Prentice Hall, 3rd ed, 1989) 246, cited in Flick Uwe, ‘Triangulation’ in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 5th ed, 2018) 444, 448.

⁶⁸⁴ Flick Uwe, ‘Triangulation’ in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 5th ed, 2018) 444, 449.

⁶⁸⁵ Ibid 451.

⁶⁸⁶ Ibid 449.

⁶⁸⁷ Ibid 452.

There are three main types of triangulation: investigator, theory and methodological.⁶⁸⁸ Investigator triangulation seeks to employ different observers or interviewers as a control to prevent bias in data collection and analysis.⁶⁸⁹ Theory triangulation refers to analysing the same data from different perspectives.⁶⁹⁰ Finally, methodological triangulation satisfies either within method or between method such as using qualitative and quantitative data.⁶⁹¹

Denzin suggested three principles of methodological triangulation:

First, the nature of the research problem and its relevance to a particular method should be assessed ... second, it must also be remembered that each methods has inherent strengths and weaknesses ... Third, method must be selected with an eye to their theoretical relevance.⁶⁹²

To resist criticism from colleagues, it is necessary to use multiple methods and data sources in a study.⁶⁹³ Mathison argued that ‘good research practice obligates the researcher to triangulate, that is, to use multiple methods, data sources, and researchers to enhance the validity of research findings’.⁶⁹⁴ Fielding and Fielding claimed that triangulation does not eliminate bias nor increase validity and accuracy, rather, it may help in gaining a further picture of the phenomenon in terms of depth and breadth.⁶⁹⁵ Silverman cautioned that the transferability of the study may not be as simple as saying what goes on in one context applies to all contexts.⁶⁹⁶

As part of sophisticated rigour, which can be described as having integrity, transparency and honesty in data analysis, Denzin commented:

Interpretive sociologists who employ the triangulated method are committed to sophisticated rigour, which means that they are committed to making their empirical, interpretive schemes as public as possible. This requires that they detail in careful fashion the nature of the sampling framework used. It also involves using triangulated, historically situated observations that are interactive, biographical, and, where relevant, gender specific. The phrase sophisticated rigor is intended to describe the work of any

⁶⁸⁸ Ibid 445.

⁶⁸⁹ Ibid 444.

⁶⁹⁰ Ibid 444.

⁶⁹¹ Ibid 444.

⁶⁹² Norman K Denzin, *The Research Act: A Theoretical Introduction to Sociological Methods* (McGraw-Hill, 1978) 303, cited in Flick Uwe, ‘Triangulation’ in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 5th ed, 2018) 444, 445.

⁶⁹³ Sandra Mathison, ‘Why Triangulate?’ (1988) 17(2) *Educational Researcher*, 13, 13.

⁶⁹⁴ Ibid.

⁶⁹⁵ Nigel G Fielding and Jane L Fielding, *Linking Data: The Articulation of Qualitative and Quantitative Methods in Social Research* (SAGE Publications, 1986) 33.

⁶⁹⁶ David Silverman, *Qualitative Methodology and Sociology* (Gower Publishing, 1985) 21.

and all sociologists who employ multiple methods, seek out diverse empirical sources, and attempt to develop interactionally grounded interpretations.⁶⁹⁷

Strong triangulation attempts to satisfy two key elements. Firstly, it must be a relevant source of ‘extra knowledge about the issue in question and not just a way to confirm what is already known from the first approach’.⁶⁹⁸ Secondly, the data must be seen to be an ‘extension of a research program’.⁶⁹⁹ Comprehensive triangulation situated within a single case study was achieved through qualitative interview, multiple investigators coding of the interviews, interviewing two distinct groups and doctrinal research. The consequences of using methodological triangulation within one method is that the data analysis results and findings satisfy data triangulation as different themes may have emerged.

4.11 RESEARCHER REFLEXIVITY

Researcher reflexivity refers to being cognisant of the researcher’s own biases to provide for an effective and impartial analysis. This in turn increases the credibility and validity of the findings. Kitto explained researcher reflexivity as:

Reflexivity is where researchers openly acknowledge and address the influence that the relationship among the researchers, the research topic and subjects may have on the research. Fundamentally, reflexivity requires a demonstration by the researchers that they are aware of the sociocultural position that they inhabit and how their value systems might affect the selection of the research problem, research design, collection and analysis of the data. It also refers to an awareness by the researchers of the social setting of the research and the wider social context in which it is placed.⁷⁰⁰

Effective researchers recognise their reflexivity in data collection and analysis, and Charmaz⁷⁰¹ and Mills⁷⁰² commented that a researcher’s sociocultural settings, academic training and personal worldviews influence what the researcher sees and how they analyse the data. Consistent with Carter and Little’s position on reflexivity, this study attempted to satisfy a

⁶⁹⁷ Norman K Denzin, *The Research Act: A Theoretical Introduction to Sociological Methods* (Prentice Hall, 3rd ed, 1989) 235.

⁶⁹⁸ Flick Uwe, ‘Triangulation’ in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE Publications, 5th ed, 2018) 444, 444.

⁶⁹⁹ Ibid 450.

⁷⁰⁰ Simon C Kitto, Janice Chesters and Carol Grbich, ‘Quality in Qualitative Research’ (2008) 188(4) *Medical Journal of Australia* 243, 245; Jennifer Mason, *Qualitative Researching* (SAGE Publications, 3rd ed, 2018).

⁷⁰¹ Kathy Charmaz, ‘Shifting the Grounds: Constructivist Grounded Theory Methods’ in Janice M Morse, Phyllis Noerager Stern, Juliet Corbin, Barbara Bowers, Kathy Charmaz and Adele E Clarke (eds), *Developing Grounded Theory: The Second Generation* (Routledge, 2016) 127.

⁷⁰² Jane Mills, Ann Bonner and Karen Francis, ‘Adopting a Constructivist Approach to Grounded Theory: Implications for Research Design’ (2006) 12(1) *International Journal of Nursing Practice* 8.

reflexive researcher in that ‘a reflexive researcher actively adopts a theory of knowledge. A less reflexive researcher implicitly adopts a theory of practice’.⁷⁰³

Table 2: Researcher’s reflexivity statement

I am an Anglo-Saxon male in my mid-30s. In my early professional career in Western Australia, I have been a government schoolteacher of physical sciences and physical education, and lecturer of swimming and water safety through AUSTSWIM and the Royal Life Saving Society. I have completed a Bachelor of Science (Hons)/Bachelor of Education from The University of Western Australia. It is through my time as a schoolteacher that I saw the need for legal literacy amongst both schoolteachers and school principals as there was no exposure to any legal training in my pre-service teacher program. After addressing a number of complaints from staff, parents and students, this was my motivation to study education law and its effects on the principalship, and how the Department of Education can best cater to principals’ decision-making in accordance with the rules of procedural fairness. As an impetus to support school principals’ legal decision-making, in my early 20s I completed a Bachelor of Laws from The University of Notre Dame, Australia and a Graduate Diploma in Legal Practice from The Australian National University, and worked as a lawyer in the field of education law for a private law firm in New South Wales.

In 2013 I commenced a full-time tenured lecturing position at a private Australian university where I have taught science education, physical education and education law to pre-service teachers (undergraduate and postgraduate), and all courses included aspects of law (laboratory safety in science, sport law in physical education, and legal issues in schools). In 2015 I completed a Master of Laws from The Australian National University, which provided me with the requisite knowledge to undertake this research from a legal standpoint. Furthermore, in my early 20s I joined the Royal Australian Air Force Reserves as a Training Systems Officer and have served in the Middle East during my commission.

During this study, I personally collected the qualitative data through semi-structured interviews. This required me to be face to face with the school principal or education lawyer for between 45 and 60 minutes. Although I was an independent researcher with strong ties to the government system, I believe that my professional career, professional qualifications,

⁷⁰³ Stacy M Carter and Miles Little, ‘Justifying Knowledge, Justifying Method, Taking Action: Epistemologies, Methodologies, and Methods in Qualitative Research’ (2007) 17(10) *Qualitative Health Research* 1316.

experience and background facilitated a positive rapport with the interviewees despite the generational gaps that sometimes existed. I am firmly of the view that school principals should be able to make decisions in their school that will withstand internal, external and legal scrutiny.

4.12 ETHICAL PROTOCOL

Ethical policies, procedures and guidelines were complied with to ensure a transparent and authentic effort in achieving applicable and relevant research outcomes. A significant consideration when undertaking qualitative research is the ‘consideration of both how data collection is conducted and analysed data are presented, and will vary significantly depending on the details and particularities of the situation of the research.’⁷⁰⁴ Researchers need to consider the quality of the data they gather against principles such as confidentiality, privacy and accuracy whilst also maintaining ethical protocols.⁷⁰⁵ Privacy and confidentiality are maintained in this thesis as none of the participants are referred to by name. All electronic voice recordings, transcripts and traceable documents have been withheld from people without a genuine need to know. The format of this research is presented in such a way that it does not indicate the origin of the data, however the data is traceable by the researcher. Confidentiality assurance is provided to all participants as ethical protocols were maintained.

Participants in this research were required to sign a written informed consent form to ensure that individual confidentiality was maintained. Initially, the University of Technology Sydney (HREC 2013000177 dated 11 April 2013) provided ethics approval for this research; however, the research was transferred to The University of Notre Dame Australia, which provided ethics approval for this research from 16 August 2017 (017125F). Furthermore, as the research was conducted in New South Wales government schools, State Education Research Application Process (‘SERAP’) approval was also granted (SERAP 2013075 originally dated 22 July 2013, with subsequent extensions approved on an annual basis). In accordance with the approvals from the University of Technology Sydney, The University of Notre Dame Australia and SERAP, the participants were fully informed, in writing, of the data collection methods and storage. All research data was de-identified, and confidentiality of the participants was assured at all times. This was in accordance with The University of Notre Dame Australia ethical

⁷⁰⁴ Douglas Ezzy, *Qualitative Analysis: Practice and Innovation* (Allen & Unwin, 2002) 33.

⁷⁰⁵ Kenneth Howe and Margaret Eisenhart, ‘Standards for Qualitative (and Quantitative) Research: A Prolegomenon’ (1990) 19(4) *Educational Researcher* 2.

guidelines and policy on the storage of raw data. All other material such as notes and workings were stored securely in accordance with the university's policy. Ethics approvals, participant invitation emails and letters, participant information sheets and participant consent forms can be found in the following appendices:

- Appendix D — University Ethics Approvals;
- Appendix E — New South Wales State Education Research Applications Process Ethics Approval;
- Appendix F — Participant Invitation Email and Letter;
- Appendix G — Participant Information Sheet; and
- Appendix H — Participant Consent Form.

Confidentiality was maintained throughout the process as pseudonyms were used on both the digital recordings and transcripts. After a period of five years after examination of the thesis, the digital recordings will be disposed of in accordance with the Australian Research Council guidelines to ensure the identity of participants is protected. In the interim, The University of Notre Dame will retain the data. The University of Notre Dame also uses this protocol for best practice in research.

4.13 CONCLUSION

This chapter presented the research methodologies used in this research. The chapter addresses the selection of semi-structured interviews for all participants, and the use of three vignettes (student discipline, special education and industrial relations) for the principal participant group for data collection and analysis. The research approach outlined demonstrates a comprehensive understanding of the methods, procedures and techniques used to ensure an interpretative approach to the research findings. The acceptance of the findings through the application of quality criteria applied to enhance the rigour of the research methodology is discussed.

The aim of Chapter 5 is to present the findings. The chapter provides an integrated discussion and analysis of the qualitative data. The research findings are presented in the form of emerging themes and sub-themes through analysis and discussion.

CHAPTER 5

FINDINGS AND DISCUSSION

5.1 INTRODUCTION

Chapter 5 sets out the qualitative findings in relation to the primary research question of the study: ‘To what extent are New South Wales government (public) secondary school principals equipped to make decisions that are consistent with the administrative law principles of procedural fairness’. The chapter is presented in two parts. First, the roles and responsibilities of a school principal are presented as commented by three government secondary school principals and one DEL in New South Wales. This sets out the framework that during the school principal’s duties, they need some understanding of the rules of procedural fairness to make legally sound decisions. Second, the themes from the interview data are presented.

The key themes that emerged as part of the study are:

- student wellbeing;
- industrial relations and procedural fairness;
- procedural fairness in policy and procedure; and
- legal training in procedural fairness for NSW Department of Education school-based staff.

The fourteen (14) participants consisted of:

- four (4) NSW Department of Education secondary school principals;
- one (1) NSW Department of Education Director, Educational Leadership;
- one (1) Employee Performance and Conduct member;
- four (4) NSW Department of Education in-house lawyers;
- three (3) external lawyers who work on matters on behalf of the NSW Department of Education; and
- one (1) independent barrister who represented aggrieved teachers in industrial relations matters.

The participants responses to the semi-structured interviews on the application of the rules of procedural fairness within the NSW Department of Education is presented below.

The participants are referred to by a pseudonym in this thesis to ensure anonymity and compliance with ethical protocols, as shown in Table 3.

Table 3: Interview participants pseudonym and position

Participants — Educational Leaders	Date of Interview	Participants — Lawyers	Date of Interview
Principal Axel	Jan 14	Lawyer Ares (internal)	Jan 14
Principal Beau	30 Aug 19	Lawyer Boyd (internal)	31 Jul 19
Principal Cole	16 Sep 19	Lawyer Cain (external)	17 Sep 19
Principal Duke	17 Sep 19	Lawyer Dion (external)	18 Sep 19
The DEL	29 Oct 19	Lawyer Ezra (external)	18 Sep 19
The EPAC member	31 Oct 19	Lawyer Finn (internal)	19 Sep 19
		Lawyer Gabe (internal)	19 Sep 19
		Barrister (external)	30 Oct 19

5.2 ROLES AND RESPONSIBILITIES OF A NSW GOVERNMENT SECONDARY SCHOOL PRINCIPAL FROM INTERVIEW FINDINGS

As part of the semi-structured interviews with the NSW government secondary school principals and the DEL, the participants were asked to outline their roles and responsibilities as a school principal. Chapter 2 provides an overview of the roles and responsibilities of a principal as identified by the literature and the AITSL principal framework. The participants perceived their roles to be complex, the duty statement was never ending, the role was continually evolving and moving with the times, and they all referred to the demanding nature of the role that required the principal to be available at all times. How the participants perceive their roles and responsibilities to be in line with and beyond the AITSL principal standards is presented below.

5.2.1 Development of Staff

The DEL and Principals Beau and Duke all referred to staff development. The DEL commented that *‘if we are talking about staff supervision, then we’re also taking about performance of their staff and ensuring that the performance of their staff is in the context of performing their duties, so code of conduct, working within the framework of that code, working in the framework of policies that are applicable to secondary schools’*. Principal Beau, on capacity building, commented that *‘I’m constantly building leaders, developing their skills and they are doing the*

same with their staff. Similarly, Principal Duke, also on capacity building of staff within the NSW Department of Education, commented that *'it's about professional learning and staff development ... so you make sure that the skills of the teachers are appropriate for the delivery of the curriculum, and also that they do it in a way that meets most of the student outcomes'*.

5.2.2 Documents and Policies

The DEL, who is at a higher level to the principal, stated that *'working in the framework of policies that are applicable to secondary schools, developing those policies and procedures for their context but complying within the overarching policies from the department for all schools ... the principal reviews the school policies so they should be reviewed from within the school by the principal and the staff ... and then there are also in some cases, not that often from my perspective in this role, they will be asked for input from the director, or they may be asked just to look over and ask for comment ... in terms of review, it is not the director's role to actually look at those policies and review them, but it's more of a role to make sure that they're in place and that they're being used'*. Following on from the DEL, Principal Beau also stated that *'I have to write documents and oversee things from a principal's perspective.'* Similarly, Principal Cole commented in relation to policies and procedures that *'departmental policies, rather than compliance because we have a lot of compliance training that we have to do, but there's also lots of face-to-face training that we have to comply with'*. Principal Duke concurred with all other participants in that *'there's a whole bunch of other areas of responsibility in terms of governance and property management'*.

5.2.3 Employment

In relation to employment (noting that serious misconduct is managed by EPAC; refer to the industrial relations theme), the DEL commented that *'principals also have the responsibility of supervision of all the staff within that school ... and that ranges from support staff, administrative staff and teaching staff'*. Similarly Principal Beau also manages the recruitment of teachers and commented that this is a large part of the principal's role: *'I've been working hard to select a dance teacher, which I have just gotten ... so just allied to that is making sure I have the right staff, and I'd say probably 20% of my time is involved in managing my staff operations together with my timetable and going through the centralised system to recruit staff ... sometimes it's an internal transfer, sometimes it's a proper merit selection process, and I have to then form panels and that's another two days out of my life, but I really like who I get.'* Principal Cole stated quite succinctly that *'I manage all staff'*, and Principal Duke stated that *'I*

organise the admin where you have to organise support around the management of the school in terms of support staff.'

5.2.4 Finance and Budget

Principal Beau discussed budget as a time-consuming task: *'I put money into what I call centres of excellence, I put a lot of time into these ... we have a sporting centre of excellence as a result of the grants and the support and just the programs I've helped set up ... we run an annual fashion show, which takes six months to prepare, hundreds of people come and I have to give them money.'* Furthermore, Principal Beau commented that *'I have finance meetings and I have to be right across the school budgets ... I'm really lucky I did an MBA, which I paid for myself ... I get \$180,000 of Gonski money, which I use to fund a future learning support coordinator and we've seen attendance and academics improve.'* Principal Cole stated that *'finance'* is one of the elements of their job as a school principal. Principal Duke similarly mentions the school's finances: *'I have to raise money ... we do raise more money than any other state government school as we don't get funded for [Redacted], so we have to find our own funds for that ... there's a certain pressure on the principal, on me in particular to come up with the money to do stuff, so that's an important aspect of what we have to do.'*

5.2.5 Leadership

Principal Cole stated that *'a lot of stuff is obviously delegated to deputy principals and I operate sort of a line management system here; however, I'm ultimately responsible'*. Principal Duke similarly discussed their role as leader of the school: *'most of the duties are about leading staff in the general direction or working well together ... in relation to the school you've got to have a vision of where you want the school to go, that's an important thing and you have to enact that vision ... educational philosophy ... my leadership style in doing so is I delegate, I give people a job and let them do it, but I was impressed upon by an inspector that came to see me a long time ago that delegation is not abdication, you still make sure that what you're delegating you're actually supervising even if indirectly but that you're still accountable for it no matter what.'*

5.2.6 Local School Network/Principal Network

Principal Beau discussed an innovative program that they developed as part of their region (one of the requirements of principals is that they develop innovative programs): *'I run a network of eight schools as I set this up eight years ago thinking what would be better than competing with*

my local colleagues, would be to collaborate and to harness our collective capacity. So, I run this group of eight schools and as a result, we have principal meetings every term. We have deputy meetings every term and a deputy in another school designs the agenda, we have head teacher meetings and I have appointed a principal to run my early career teacher program and aspiring leaders' program.' The DEL confirmed this: *'in the context of working within a network of other principals, for example, in my network there are four secondary schools, and it's in the context of performance in comparison to other schools within the state, and it's being part of that system as well'*. This identified that principals do not work in silos within their own schools, rather they are part of a larger network of neighbouring schools and of an even larger system, being the NSW Department of Education.

5.2.7 Parental Management

Principal Beau gave a real-life example of parental management: *'we had a parent in the foyer being really aggressive, threatening to go to the workplace of a kid and get him for bullying his son, not being aware that, that kid he wants to get has already been jumped by three other boys and seriously assaulted on the way home by friends of another boy we recently inherited from another school who gets other people to do his work, and his brother had previously been assaulted two weeks earlier at his workplace through that boy's friends ... so today, I've had to send an Enclosed Lands Act letter to the father who was so out of control yesterday that staff really feared for their safety.'*

5.2.8 Professional Learning

Professional learning is a large part of a teachers ongoing registration through NESAs. The DEL commented in relation to professional learning that *'this part of the role is done in conjunction within school performance, is ensuring that every teacher and their school leaders within their school, are continually growing and that is in the context of working within a system, a government system'*. Principal Beau commented that *'keeping up with the best strategies to build a culture of professional learning and maintaining that as you may lose up to 10% of your staff through promotions, retirements, transfers, etc ... one of my brilliant staff designed and got accredited 15 professional learning programs so every faculty in the secondary system had a day to do professional learning, which was registered and accredited'*. Similarly, Principal Cole also had an active role in professional development for their staff: *'I have a fairly active role in professional learning in the school, and my main interest is the kind of professional*

learning that I think teachers should have in order to provide the best possible education for our students ... we spend a lot of time and money on professional learning.'

5.2.9 Property

Principals Beau, Cole and Duke all mentioned property. Principal Beau stated that *'a significant amount of my time is taken up with property issues ... we just had to install three more demountable classrooms on the oval ... the oval is quite hazardous when you have 500 kids on it at lunchtime ... I have to deal with property issues all the time, we've got termites, which means that part of the school can't be used at a period of time and it's a huge amount of paperwork with all of this'*. Similarly, Principal Cole stated: *'anything to do with property on the school site'*. Principal Duke also stated: *'I have to organise support around the management of the school in terms of property and I have had two development plans of ten years and I've tried to implement those site development plans as well.'* Therefore, property management is a large, complex and time-consuming task for a principal, many of whom are not trained in building and construction project management.

5.2.10 Risk Management

Principal Beau in discussing risk management stated that *'there's a risk management procedure that has to happen in every school ... we all follow the processes, we're all very conscious and we have great advisors available for us when there's a major incident ... so every major incident back comes an email, do this, this and this and this and you tick it off'*. Principal Beau further commented in relation to risk management that *'I've health and safety to manage, which as well takes up a huge amount of my time also.'*

5.2.11 Student Wellbeing

The DEL and all principal participants mentioned student wellbeing, which is discussed in the student wellbeing theme within Chapter 5. Safety and welfare of students, their families and members of staff as well as the smooth and effective operation of their schools has also been mentioned by education law scholars as a fundamental element of education law.⁷⁰⁶

⁷⁰⁶ Phillip H Wagner, 'An Evaluation of the Legal Literacy of Educators and the Implications for Teacher Preparation Programs' (Conference Paper, Education Law Association Conference, 16 November 2007); Howard J Eberwein III, 'Raising Legal Literacy in Public Schools, a Call for Principal Leadership: A National Study of Secondary School Principals' Knowledge of Public School Law' (EdD Thesis, University of Massachusetts, 2008); Karen Starr, 'Problematizing 'Risk' and the Principalship: The Risky Business of Managing Risk in Schools'(2012) 40(4) *Educational Management Administration & Leadership* 464; Allison

5.2.12 Teaching and Learning

Principals Beau and Cole also discussed the quality of teaching and learning at their respective schools. Principal Beau stated that *‘a huge amount of our time goes into managing the quality of teaching and learning and I love being part of that team and developing the team that I have in that area, so the responsibility there involves attending many conferences, reading widely, keeping up with the latest pedagogical practices’*. Principal Cole further added that *‘my main role as far as I’m concerned is overseeing or looking after teaching and learning in the school. So unfortunately, what happens is, a lot of the other stuff kind of gets in the way of that, but certainly my preferred role in the school is leading teaching and learning.’*

5.2.13 Areas of Law

The general areas of law identified by the principal participants as those they need to understand are listed in Table 4.

Table 4: General areas of law encountered by school principals from interview data

Area of Law	Area of Law
Admin law	Employment law
Child protection	Family law
Commercial law	Finance law
Controversial issues	Freedom of information
Criminal law	Intellectual property
Defamation	Migration law
Discrimination/disability	Negligence
Education law (enrolment and international students)	Property law
Excursions	Workplace health and safety law

The participants’ comments reiterate and confirm the wide range of roles and responsibilities of a principal. The comments also highlight the range of legal issues dealt with by principals, which adds to the complexity of their role, as discussed in Chapter 2. This data is consistent with the findings in Trimble’s⁷⁰⁷ study of Tasmanian school principals; however, her research

Trimble, ‘Education Law, Schools, and School Principals: Findings from a Mixed Methods Study of the Impact of Law on Tasmanian School Principals’ (2020) 23 *International Journal of Law and Education* 70, 70.

⁷⁰⁷ Allison Trimble, ‘Education Law, Schools, and School Principals: Findings from a Mixed Methods Study of the Impact of Law on Tasmanian School Principals’ (2020) 23 *International Journal of Law and Education* 70, 73.

encompassed the entire compulsory schooling sector, including public, private, Catholic and independent. Some areas of law are irrelevant to the government school principal such as religion in school beyond understanding that religion cannot be a compulsory subject in government schools as per the *Education Act 1990* (NSW) ss 6 and 34. Other scholars have found that there is an ever-increasing demand of legal knowledge required by the school principal.⁷⁰⁸ In their initial response to the interview question, Principal Beau stated: *'I don't think they'd be an area of law that my work wouldn't touch ... there's just so much law ... absolutely everything ... there's so much law.'* Stewart,⁷⁰⁹ McCann⁷¹⁰ and Trimble⁷¹¹ all commented that school principals need to be able to manage the legal issues confronting them, which includes having a degree of confidence in managing matters of a legal nature, accuracy of legal information, relevance (that is, changes in the law), and sources of legal information to make informed decisions.

The discussion that follows examines one area of a principal's roles and responsibilities that is time consuming for principals, which is decision-making in accordance with the rules of procedural fairness.

5.3 THEME 1: PROCEDURAL FAIRNESS IN POLICY AND PROCEDURES

In Chapter 3 the fundamental elements of procedural fairness were discussed and the two elements of procedural fairness were identified: the hearing rule and the rule against bias. As explained in Chapter 3, the doctrine of procedural fairness is fundamental to lawful administrative decision-making, in which school principals engage on a regular basis. However, it was also noted that understanding and applying procedural fairness is not always clear cut and it is an area in which principals do require some substantive legal knowledge. To this end, this thesis sought to identify what applied knowledge principals in NSW government secondary

⁷⁰⁸ David J Wardle, 'School Related Law: Do Principals Know What They Need to Know?' (MEd Thesis, Massey University, 2006); Alan W Leschied, Wendy J Lewis, and Gregory Dickinson, 'Assessing Educators' Self-reported Levels of Legal Knowledge, Law-Related Areas of Concern and Patterns of Accessing Legal Information' (2000) 14(2) *Journal of Educational Administration and Foundations* 38; Nora M Findlay, 'In-school Administrators' Knowledge of Education Law' (2007) 17(2) *Education & Law Journal* 177; Susan J Hillman, 'School Administrators' Legal Knowledge: Information Sources and Perceived Needs' (EdD Thesis, University of Montana, 1988); Delaney Batson White, 'An Assessment of the Level of School Law Knowledge of South Carolina School Principals and the Implications for Litigation and social Justice' (PhD Thesis, University of South Carolina, 2012).

⁷⁰⁹ Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge Needed and held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996).

⁷¹⁰ Paul McCann, 'Principals' Understanding of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006).

⁷¹¹ Allison Jane Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017).

schools have when making decisions affecting individuals. This theme seeks to provide a discussion about the knowledge that principals possess in the domain of procedural fairness. To give context to the complex environment in which principals work, there are over 200 NSW Department of Education policies, procedures and guidelines publicly available to educators and parents through the NSW Department of Education online policy portal.⁷¹² The remainder of these procedures and guidelines are available through the department’s intranet, which is only accessible to NSW Department of Education employees. There are some 215 documents, which makes the position of the school administrator challenging.⁷¹³

Table 5: Number of policies, procedures and guidelines as published by the NSW Department of Education

Policies	Procedures	Guidelines	Total
85	78	52	215

Policy documents assist the school principal in defining what they must do, what they are duty-bound to do and what they are forbidden from doing.⁷¹⁴ Well-constructed and well-written school policies assist with both federal and state legislation compliance, and set a foundation for fair, effective and efficient school governance.⁷¹⁵ Policy documentation assists schools with making decisions by detailing what should be done, why it should be done and who has the power to do it.⁷¹⁶

The NSW Department of Education produces a series of legal issues bulletins⁷¹⁷ to inform school staff how the NSW Department of Education complies with the law. Appendix C is an extract of the legal issues bulletins that are publicly available as at 22 June 2020. A full list of legal issues bulletins can be found on the NSW Department of Education legal issues bulletin portal.⁷¹⁸ These legal issues bulletins are fundamental to NSW government school principals

⁷¹² NSW Government, Department of Education, *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library/a-z>>.

⁷¹³ Email from Todd Douglas, DEC Policy, Planning and Reporting to the author, 7 August 2014. An email was sent to the NSW Department of Education on 26 March 2020 to reconfirm the data provided in August 2014; however, no response was received. It is assumed that if there were any changes, these would be insignificant in number.

⁷¹⁴ Ibid.

⁷¹⁵ Edwin C Darden, ‘Policy, the Law and You’ [2008] (Spring) *American School Board Journal* 54 <<https://www.nsba.org/ASBJ/2021/April>>.

⁷¹⁶ Ibid.

⁷¹⁷ NSW Government, Department of Education, *Legal Issues Bulletins and Guidelines* (Web Page) <<https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins>>.

⁷¹⁸ Ibid.

(both primary and secondary) in understanding how to apply the law in complex situations that arise at the school, such as student discipline, restraint of students, family law, child protection, workplace health and safety and several others. As advised by the legal directorate, the legal issues bulletins are made publicly available on the department's website in the interest of openness and in keeping with the principles of the *Government Information (Public Access) Act 2009* (NSW). Furthermore, the legal issues bulletins are regularly updated by in-house NSW Department of Education legal officers and as such, may reach over 2,200 government schools throughout NSW, which translates into approximately 8,000 staff at the assistant principal, deputy principal, principal and DEL level. Similarly, the legal issues bulletins are of critical importance for school principals in understanding the law and in understanding the application of the rules of procedural fairness in decision-making (*Legal Issues Bulletin 3 Procedural Fairness in the Department of Education*).

There are several advantages for government decision-makers in following the rules of procedural fairness, which are discussed in Chapter 3. The key advantages to following procedural fairness in the government school context are to ensure a fair decision-making process, and to give individuals an opportunity to know the case against them, answer it and have an impartial decision-maker. Principals should look at procedural fairness as an opportunity to improve the reliability of their decisions rather than as an onerous obligation. Gleeson CJ suggested that 'fairness is not an abstract concept. It is essentially practical ... the concern of the law is to avoid practical injustice'.⁷¹⁹ Principal Beau discussed their experience in having decisions reviewed: '*I've learned that these are an administrative procedure and so, they can only appeal on the basis of process, which is delightful.*'

5.3.1 *Principals Responses in Complying with Procedural Fairness through NSW Department of Education Policy*

When principals responded to the interview questions either through the vignette or through real-life examples, all participants linked their decision-making processes back to policy documents published by the NSW Department of Education, many of which advised that procedural fairness was embedded within the policy documents themselves. The DEL stated that '*you would have to look at the suspension policy as well ... there are procedures and processes that would sit behind a suspension and I would talk to my executive about that, as this is where I think that we'll look at procedural fairness because the question will be in the*

⁷¹⁹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 13–14.

students' minds'. When dealing with performance management of staff the DEL commented that *'there are procedures in place for the performance of teachers'*.

Principal Duke discussed the several hundred policy and procedure documents available to consult when there was a particular issue or problem at the school; however, at times this became overwhelming for the principal: *'it's handy to find the books of rules, usually there is a book of rules somewhere, and the department's got so many books of rules, it's unbelievable. Two or three hundred major, important policies, which are important to them, but not to us at the coal face because we don't even know what they are most of the time. To see how you are supposed to proceed in certain matters to deal with it and so that's what we tend to do.'* While Principal Duke is cognisant of the policies and procedures of the NSW Department of Education, they are also realistic as to how these may apply in each situation at their school. Principal Duke further added that around staff performance, the NSW Department of Education has attempted to make the policies and procedures easier for school principals: *'so when it comes to the teacher improvement programs and efficiency performance, they [EPAC] have made an effort to make it a bit easier for principals'*. The major issue that Principal Duke responds to with respect to policy and procedure around staff performance, is the fact that *'it takes so long and it's so harrowing, it's not the paperwork that is the problem, it is the people that become the problem'*.

When asked about their knowledge of the rules of procedural fairness, Principal Beau responded: *'the policies are based on law, whether it's through statutory law or the common law of precedence, particularly even in relation to issues like conduct, misconduct of public servants, we have a code of practice and a code of conduct that is very explicit, and I don't think there is any policy that does not have built in the fundamental processes of procedural fairness'*. Principal Beau further added that this is one of the reasons why they like being in a government school rather than the private sector: *'that's why I like being in a government school, I hear people talk about what happens in private schools, I'm just so delighted that everything is transparent, documented and centralized and available to everyone.'* Similarly, Principal Beau's reflection on the concept of procedural fairness was that in their view, the NSW Department of Education was predominantly doing a good job embedding procedural fairness into policy where the decision may affect an individual. Principal Beau referred to the policies and procedures in which they work: *'there isn't any elements of what we do that isn't covered by procedural fairness'*. Furthermore, Principal Beau summarised their compliance

with procedural fairness as *'it just makes sense that there's a really good system of support [human resources ('HR'), DEL, legal, etc] and it does work ... I wouldn't want to work anywhere else where I would be winging it ... that would be nerve wracking'*. Finally, and very profoundly, Principal Beau stated that *'I don't think we [referring to principals collectively] have any problems with procedural fairness ... I think it is built into our system. As I said, it's inherent in every policy, in every practice we use them ... we generally use the same policies and practices that cover the major things we do.'* Principal Beau therefore relies on policy documents created by the NSW Department of Education and applies these policy documents in the given context at a large urban government secondary school in NSW.

Principal Cole responded with respect to their knowledge and understanding of the rules of procedural fairness: *'I think I have a pretty thorough knowledge of all of that, so students, when it comes to disciplinary matters, I know thoroughly because of my previous school, not because of here, because it was a little bit of a suspension revolving door.'* Principal Cole was knowledgeable about the rules of procedural fairness from their lived experience as a deputy principal. To the follow up question *'Did [they] learn a lot more about procedural fairness having gone through that lived experience?'*, Principal Cole responded *'absolutely'*. Principal Cole again discussed their lived experience: *'at my previous school, my principal was an absolute psycho about procedure ... he was the one that had to make sure that we're compliant ... absolutely everything had to be perfect because that meant that I learned what it is that you have to do ... so I came here and yes, procedural fairness was always followed'*. This is a clear example that lived experience in conducting investigations as a deputy principal prepared them for the role of principal. Principal Cole added that the main concept of procedural fairness is that *'you want to be fair and you want to make sure that all boxes are ticked, but if it comes back to bite you, or there is an appeal put in against the suspension or against the action that we take, we can demonstrate that we have actually got all the evidence, we followed procedure, we've done everything you have to do, so everything is documented'*. From Principal Cole's response, they are cognisant of the application of the hearing rule, as discussed in Chapter 3, which requires an opportunity to present one's case and the opportunity to lodge an appeal.

Similarly, Principal Cole gave further real-life examples of their actual process when dealing with discipline matters: *'I know all of the procedures around that, so I am absolutely psycho that we stick to those.'* Principal Cole goes step-by-step through their processes (it must be noted that no prompts or reference documents are relied on in any of the participants responses),

demonstrating a sound understanding of the rules of procedural fairness as applicable to discipline decisions. Principal Cole stated: *'(1) that there is an investigation if an issue arises and (2) we get statements if appropriate or if possible, from teachers and/or students involved ... (3) and then we have a formal disciplinary meeting ... (4) the student has a support person, or at least offered a support person ... and (5) everything is documented.'* In providing procedural fairness in discipline decisions, Principal Beau made the decision in real-time once each of the elements of procedural fairness had been addressed. They added that *'the decision is made in the room at the time about what the consequences are going to be'*. Linking back to the wellbeing of students, Principal Cole intertwined the processes, evidence and the student's needs as follows: *'So you might think, "Okay, well this looks like it might be heading towards a suspension, given the nature of the issue, we'll see what happens", and of course you need to take into account context, you need to take into account the student's previous record, whether there is any learning disabilities, all those kinds of things. Then we just follow those procedures, which are all really clearly outlined in the suspension or disciplinary policy.'* Principal Cole separated procedural fairness into two distinct categories: students and teachers. In affording teachers procedural fairness in decisions that affected them, Principal Cole noted that the NSW Department of Education had a dedicated team to deal with teacher performance and they were the referring officer: *'when it comes to teachers around procedural fairness, that might relate to complaints about them or my concerns about their performance ... the first port of call is always EPAC ... whether that is to do with conduct or whether it is to do with their performance in the classroom, I seek advice from them'*.

At the start of the interview, Principal Duke did not believe that they dealt with the area of procedural fairness; however, after approximately sixty minutes answering the semi-structured interview questions and the vignettes, they came to the realisation that they do deal with a significant amount of matters that incorporate the concept of procedural fairness: *'there has been a fair bit in procedural fairness when I think about it ... a various range of things ... there's quite a lot'*. After going through their checklist for dealing with matters that involve procedural fairness, Principal Duke stated that *'both parties have got to have a right to be heard, that is your first right ... you have to have a support person when you're dealing with someone, so they are the two things'*. Principal Duke further added that *'you have got to be given the documentation that the procedure says you're going to get, so that you're fully informed about what the process is that your about to embark on'*, referring to the relevant NSW Department of Education policy, procedures and guidelines. Principal Duke then gave a real-life process

that they followed to resolve disputes at the school level: *'complaint resolution procedures are fairly common in schools and there is a fair set of processes that you've got to go through, and usually they try and keep it at certain levels where you have two people try to solve the problem ... You have a mediator try to solve a problem for them ... if that does not work, you bring it to the principal ... they each have a support person each trying to get "What do you want, what do you want, what's the resolution we want". I write it all down, sign it up and keep it, in the hope that that's the end of it and that's most of what you have to do.'* So, while the discrete elements of procedural fairness may not be present in Principal Duke's response, as a matter of good practice and a common-sense approach they give parties an opportunity to be heard and a decision is made in a fair and impartial manner.

The EPAC member discussed procedural fairness around complaints handling and advised that these things happen daily and regularly in schools: *'a teacher is giving a child too much homework and is unpleasant and rude and will come in and talk to the principal ... the principal in those circumstances would be required to give the teacher sufficient information to be able to respond to that complaint ... it should be addressed with the teacher ... the principal would be expected to give the teacher sufficient information and time to respond either at an interview or in writing if they wish to do so'*. The EPAC member was further asked what the NSW Department of Education's view on a flawed process would be. The EPAC member responded to recent Industrial Relations Commission decisions in that *'it depends on whether it's so flawed that it is going to have an impact on procedural fairness or an outcome ... while X, Y and Z did not occur, the person didn't get their update letter when they should have etc, it is not sufficient to indicate that the process is sufficiently flawed to make the outcome invalid ... these are procedures and guidelines, they are not something that says 'Thou Shalt' ... there are some things in our guidelines that are very clear, you must do such as people must have a right of response, but there are other things that if it's a day or two delayed that's not going to affect [procedural fairness]'* However, in reflecting on the 2,200 public schools in the NSW Department of Education, the EPAC member clearly stated that *'I think there is probably lots of procedural fairness stuff at that local school level that never reaches the light of day here'*, which may go to show that based on the EPAC member's perception, principals in NSW government secondary schools are doing a sound job at applying procedural fairness. The EPAC member was explicitly asked 'Do principals apply the principles of procedural fairness well?', to which they responded: *'very variable'*.

Due to the size of the NSW Department of Education, it is difficult to identify which principals apply the rules of procedural fairness well and which do not in accordance with NSW Department of Education policy, procedures, and guidelines. Chapter 2 provided a discussion regarding the training of principals in procedural fairness. As can be seen from the EPAC member's response, because there is no formalised training there is no benchmark of understanding expected of principals in their knowledge of procedural fairness. This creates a risk for the NSW Department of Education.

5.3.2 *Frustration with Procedural Fairness*

Principal Duke explained their frustration with procedural fairness when they had to remove a staff member from a school based on them being an ineffective educator: *'you have to be prepared to go through the entire agonizing process, which is reams and reams of paper, every single 'I' dotted, and 'T' crossed to make the whole thing work, and even then, at the end, you may not be successful, so you have to state the cause'*. Principal Duke summarised this frustration with employment matters with the sentiments from two other head teachers who also went through the process of performance managing a staff member: *'I don't think I'd do that again, don't ask me to do this again.'* Principal Duke explained why the process in procedural fairness around employment matters is challenging for the school principal: *'because in the end, the staff members who know that someone's incompetent, basically, because it's such a harrowing and awful process for this incompetent teacher, that in the end, they side with the person against the school executive because it seems so cruel that ultimately that they are still there suffering day-in and day-out'*. Principal Duke puts the wellbeing of the students first: *'it had to be done, but the opportunity cost of it was pretty high in terms of what happened'*. Because the process is time consuming and does not always consider the wellbeing of staff, affording procedural fairness in employment matters can ultimately affect individual faculties: *'the head teachers felt it hasn't been good for their faculties ... that's an issue for them'*.

Principal Duke vented their frustration around procedural fairness more broadly in the NSW Department of Education: *'the fact that they [NSW Department of Education & EPAC] make it procedurally so difficult is also the reason why there's still so many incompetent teachers around because people won't do this ... and as a consequence, principals will try to get rid of them by some sort of administrative means or nominating them out of the school'*. Principal Duke was of the view that many principals will avoid going through the long and arduous NSW Department of Education process and that *'they'll do something they shouldn't do, to avoid*

going through this very long process'. Principal Duke provided the example of when a teacher was placed on an improvement plan to articulate how difficult and time consuming the process is: *'they said it would take ten weeks, but then the process doesn't take ten weeks because you've got to go through a whole bunch of processes before the ten weeks. It used to be that you had a pre-improvement program that went for four or five weeks, and then you could put them on a program if they didn't get this program ... Now you don't have a pre-improvement program, but you can't just put them on a program until you've tried these things ... A list of things first. So, it really is a pre-improvement program program... and it's still tied-up in red-tape, and so people are reluctant to embark on it because it takes so much time and effort.'* The application of procedural fairness to the educational context as discussed in Chapter 3 and NSW Department of Education policy is a positive approach to ensure fairness. However, the practical application due to the demanding and time-consuming nature make the process frustrating for principals as they have numerous other duties, as discussed in Chapter 2, with decision-making being but one of those duties.

Similarly, Principal Beau gave a harrowing example of just how long procedural fairness can take when performance managing a teacher: *'I've been doing eight years of performance management with her ... it took me that long to get there because it took so long to get on top ... we had spreadsheets because we had to deal with each issue separately ... in the early days there was a letter of instructors or a letter of advice before you got to letters of direction of what (expletive), but they have now shrunk it a little bit far, but now it's too arduous. You've got to be so tenacious, and in fact, EPAC said that my documentation was second-to-none, but that's because I got my personal assistant to put everything together ... So whenever I see a staff member starting to become an issue now, and that's early days because I don't want to waste that much time damaging kids again, I get them to start spreadsheets, I document everything ... date, time, support offered, etc.'* Furthermore, Principal Beau voiced their frustration at the complexity of the number of policy documents and the challenges in understanding the processes and guidelines: *'I mean, you've got to struggle sometimes to fathom it, sometimes it is really irritating, and I can quote you the fair work, fair action process in managing misconduct where a lot of us [referring to herself and other principals] are really frustrated.'* Principal Beau linked back to an example where they worked closely with EPAC to dismiss a teacher on the grounds of underperformance: *'I have tested the system, I found it exhausting ... I took a week's leave just to write a rebuttal, but she's gone.'* After a learned experience of removing a teacher, Principal Beau stated: *'It is so ridiculous, it's such a*

ridiculous approach, but that's procedural fairness gone mad ...' Finally, Principal Beau summarised the entire process of performance management and procedural fairness: *'all of this comes at a huge personal cost to us all ... I lost my entire holidays'*.

Principal Cole talked about their frustration with procedural fairness: *'it's really the amount of time and sometimes, well usually, the emotional energy that is involved ... it's very hard not to get invested in, if there's a teacher who's not performing, well, you have to think, they are still a human being ... but you have to think, "Okay, what's best for the kids? What's best for the other people working with this person? What's best for this person?" But they are still a human being and you don't deal with those sorts of things happily.'* Principal Cole further mentioned the significant amount of time spent on complaints handling and affording procedural fairness: *'I still have to spend a lot of time constructing the responses and just triple checking everything and it's the time, in the end it's time I would much prefer to spend my time with teachers and students.'* So not only did Principal Cole discuss the emotional toll in affording procedural fairness, but they also had time constraints in responding to matters around student discipline, special education and industrial relations, which distracted from being the lead educator in the school and looking after the wellbeing of the teachers and students.

5.3.3 Compliance with Procedural Fairness

Principal Beau discussed the ability to comply with the elements of procedural fairness in the school as *'the biggest barrier to compliance is probably having six things going on simultaneously ... I still remember when I was at School (my previous school) [Redacted], we had two major incidences happening simultaneously, we had a teacher assaulted in the library that was really big and we had a major assault of a kid outside the school by about 10 boys'*. Principal Beau further mentioned the complexity of complying with procedural fairness because decisions need to be made quickly at a school for the wellbeing of both staff and students: *'you often find these issues happening simultaneously, that's when it's really hard and you're trying to manage your way through, you can't. You actually can't do it. There will be lapses ... there will be things you can't get right ... and so, we've got to come back to those lovely legal words of harsh, unjust, unreasonable, whatever.'* Consistent with the discussion in Chapter 2, principals have a myriad of roles and responsibilities, which means devoting their entire attention to procedural fairness when decision-making is made more complex than for decision-makers in other government departments such as the Department of Immigration where the decision-maker may have the luxury of more time and may only have to consider one

matter at a time. If the principal only had one matter occurring at a given time, then affording procedural fairness consistent with the requirements discussed in Chapter 3 may be more achievable.

Similarly, Principal Duke previously had compliance issues with procedural fairness at the school: *'every time they put out a policy, they say, "These are the rules of procedural fairness around this, these are the basic rights that people have got ... and you don't do things unless you abide by those" ... because if you miss a step, particularly in relation to industrial relation matters, you can come to grief.'* Principal Duke gave a real-life example of having both a compliance issue and being frustrated with the rules of procedural fairness when performance managing a staff member. Principal Duke *'had a person who had both performance issues and code of conduct issues and they were affecting one another to a great degree, and so I tried to put the person on a program and the union was insistent upon these being separated, they would deal with one or the other, but not both of them'*. Furthermore, Principal Duke noted that they spent *'a fair bit of our time checking the steps in relation to procedural fairness around parts of our weekly work ... most of these are because there are specific things in relation to procedural fairness that have been trained in them, and they've been established for quite some time'*, which adds to the time it takes to comply with the rules of procedural fairness at a school level.

Principal Cole also resonated on the issue that affording procedural fairness takes a significant amount of time away from other duties as a principal: *'we don't have enough time to do all of the things that we're required to do and the things that we need to do really to be functioning properly in this role. And in saying that, that's not a whinge, that's just fact. I think there's a lot of things that could be taken away from us [principals] that we shouldn't need to deal with, but at the same time, I mean there are sorts of things like complaints or issues with teachers or with students, we really need to deal with those at a school level because we need to have an understanding of what's going on around those.'* Principal Cole summarised the double-edged nature of affording procedural fairness in decision-making because on the one hand the process is time consuming, but on the other hand they also believed that the principal is the person best placed to make the decisions around student discipline, special education and industrial relations as they are the frontline decision-maker.

The DEL commented on the time-consuming nature of reviewing complaints to ensure the appropriate and adequate steps were taken by the initial investigators and decision-makers:

'Reviews are very time consuming, because then each one of them needs to be looked at, investigated and when it's a review, it's not the actual review as yet, it's the initial complaint, so complaints come through as compliant then they may not be happy with the answer that they receive, and so they can ask for a review, which means it would be reviewed by the ... executive director would review it, or they would give that to somebody else to review ... so it's time consuming for not just one director, it's time consuming for all directors and the Executive Director as well if they're looking at reviews ... and quite common too, is that those complaints may not necessarily go to the operational directorate level, they may go to the Minister, which means they come back to us anyway.' When asked if it was a regular occurrence for the DEL to review principal decisions, the DEL responded that *'I have done lots of reviews of principal's decisions, it's constant, on a weekly basis they come through.'* The DEL was further asked how many decisions they reviewed involved breaches of procedural fairness. The DEL answered that *'in one instance, I have had to go back and say, "You could have done this a better way", so the principal had done somethings, hadn't done some things the right way, but they haven't done them in a way that's been of any harm to the student or any disadvantage to the student ... the parent might disagree with that so that's where it can get complex because you might agree with the parents, and say that I have counselled the principal around this and have guided them towards the right procedures.'* The DEL was able to provide further examples where they had *'done four serious ones, and two I've had to talk to the principal about some of the procedures, but complaints are complex, and the principal could have done one element better, but the other elements were judged as okay'*. This is consistent with the issue that the NSW Department of Education is facing in that it is unknown what knowledge principals have regarding the application of the rules of procedural fairness as they predominantly gain an understanding of procedural fairness through on-the-job exposure, which is discussed in Chapter 5.

5.3.4 *Fundamental Element of Fairness*

The main concept of procedural fairness is that the process is fair. That is, both parties have the opportunity to be heard and an impartial decision-maker makes the decision. As discussed in Chapter 3, the principle of procedural fairness is based on a democratic decision-making

process entrenched in a common sense and common decency approach to citizens.⁷²⁰ Gleeson CJ of the High Court of Australia put it in 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.⁷²¹

The DEL commented that the NSW Department of Education was always looking for better ways to make decisions, so that those decisions were fair: *'it's a challenge because we're finding more and more people who feel that they are the victims of those consequences, of those situations now have more of a right to ask for that to be reviewed or will complain about that, so it's that procedural fairness from their side ... if they feel that it hasn't been handled the right way and so the director role is becoming more predominant in looking at that for those types of situations'*. Similarly, the EPAC member stated that *'I always say fairness is the key'*. Principal Cole was of the view that the process has now gone too far in that *'the formal program is so procedurally fair, it's almost ridiculous'*, indicating that there is a fine balance between procedural fairness in the context of what works for principals in their decision-making and what is fair for an underperforming teacher. Likewise, Principal Duke stated that *'I think that essentially you have to have some sort of moral compass about what's fair and what's not fair ... It'll generally speaking be lawful, if it's fair and to some degree it'll be unlawful, if not unethical, if the behaviour is unacceptable.'*

5.3.5 Perception of Bias of NSW Government Secondary School Principals

The barrister who represented aggrieved parties, mainly teachers, commented that *'some things that I have been concerned about is that you will often have school principals making decisions in circumstances where they have had direct oversight over that teacher, and if you've got a situation for example where there's a personality clash with the principal and that employee [teacher] then you can have real problems around impartiality, objectivity and the teacher feeling as though they aren't getting a fair hearing'*. The barrister further explained that the perception of bias becomes problematic in situations of teacher misconduct or performance because in the early stages of performance management of staff, the principal is guided by the advice of EPAC: *'in the context of EPAC ... there is often consultation between school principals and EPAC as a body, and EPAC will advise school principals about the sorts of*

⁷²⁰ Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thompson Reuters, 6th ed, 2017) 397.

⁷²¹ *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 195 ALR 502, 511.

things that they should do in managing employees who are teachers, and from my perspective, that could be problematic because assuming the internal review process does not go as well as it should from the department's perspective, then those matters are often referred to EPAC'. The barrister then provided a commentary with respect to the perceived bias that may exist by stating that *'it would be one thing if EPAC had no involvement in those early phases, but in my experience it's not atypical for EPAC to be involved, at least in an advisory capacity for principals who are, I guess assessing the performance and/or behaviour of their teaching staff'*. Finally, the barrister provided a discussion around teacher improvement plans, which have often been set up for the teacher to fail: *'at the internal level there are sometimes potential issues of conflict because a principal is reviewing a teacher that they have been critical of, and sometimes they are putting them on things like teacher improvement programs and certainly some of my clients have had the sense that those teacher improvement programs were loaded in the negative'*. Consequently, the barrister is of the view that all matters involving the performance of staff should be handled by an impartial unbiased decision-maker who is external to the school.

In the case of the NSW Department of Education, minor infractions are often handled by the school principal; however, any matter that may gravitate towards termination is handled by a member appointed to the EPAC team. In their concluding remarks, the barrister stated that *'my advice to principals or teachers is that the more you can have a degree of impartiality involved whether by bringing in someone that's not directly connected, the better'*. This is certainly one of the elements of procedural fairness and is discussed in Chapter 3 and the Tedeschi review.⁷²²

The barrister gave the real-life example of where the rule against bias was breached by a school principal in a matter in which they assisted where *'the principal had basically said, "I'm going to do this, I want you to come along to the meeting and explain why I shouldn't."* And in relation to that, it was as simple as us saying, *"Look, you've already expressed prejudgment there, you have spoken as to what you're going to do prior to hearing them out."* And just reminding them that that is antithetical to the principles of procedural fairness because you haven't given them a right to be heard.' Here, the barrister expresses a clear problem with some principals in NSW government schools affording procedural fairness and the need for a competent person to

⁷²² Mark Tedeschi AM QC, *Review into the Functions and Operations of the Employee Performance and Conduct Directorate (EPAC) within the New South Wales Department of Education* (Final Report, June 2019) <<https://www.education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/media/documents/EPAC-Report-2019-Final-Secured.pdf>>.

oversee that the rights of the individual are respected. This may go to strengthening the argument discussed in Chapter 2 regarding the training requirements for principals in affording procedural fairness.

Lawyer Gabe talked about the lack of an unbiased decision-maker in matters involving issues at the school such that *'sometimes people lose sight of that other element of procedural fairness, the unbiased decision-maker and proceed, having conducted the investigation and made a decision, made a conclusion and impose the decision in circumstances with them. They may have a conflict of interest or there's no reason to believe that this perception will pass, so that's another problem we fall to. And it can be complicated in circumstances we might have a one teacher school, so that can be really hard to meet the legal tests because primarily principals are educators, and they are the lead learner in a school, they might not necessarily understand the consequences of not taking a step, so that's somewhat of an issue.'* A follow-up question was asked of Lawyer Gabe as to whether they had ever seen an argument with respect to bias in NSW public schools against a principal. Their response was that *'this is one of the complexities of education, particularly in rural and remote areas. You have a principal who has a child who is a student at the school, and then clearly there is an issue there of a perception of bias if they deal with conflict between their child with someone else, that's an example that's occurred. I've also had the issue about bias on the decision-maker from a parent who said, "I've complained about you, so when you are dealing with my child in the following year, you are biased against my child because I've made that complaint"; that is one that is raised reasonably frequently in the matters that I deal with.'* Lawyer Gabe discussed the practical challenges of an unbiased decision-maker in the context of public education, particularly around small schools (as discussed in Chapter 3) or when a principal does not understand the ramifications of what happens if they get the process of procedural fairness incorrect. The researcher asked a second follow-up question around the recommendation in situations such as small schools and the argument of bias; is the decision then deflected to the DEL?

Lawyer Gabe provided an insightful example of situations where bias in small schools has been raised and what the approach of the NSW Department of Education has been in relation to combating the perception of bias: *'in some circumstances you might say, maybe we can get the director to make the decision, or a principal from another school. However, there can be difficulties in getting it if it's a small school, but there is more than one staff member, and there can be some complexity if you ask the assistant or deputy principal to deal with it, sometimes*

that's acceptable, sometimes the argument will be raised that the assistant/deputy principal is under the direction of the principal so that we still have an issue, so they say you really need to customize the issue to suit the circumstances.' Lawyer Gabe finally added that *'people can get extraordinarily passionate about very small things, and so you are not necessarily going to put a whole range of processes in those circumstances'*, which resonates with the level of the penalty and whether the situation of which the parent or student complains warrants a complex process to make a decision about small matters. Therefore, appointing an alternative decision-maker to avoid the perception of bias is often based on the gravity of the consequences such as a long suspension or exclusion, compared to a trivial matter such as who took all the whiteboard markers out of the storeroom and hid them in a teacher's drawer.

The barrister discussed an issue of internal bias within the NSW Department of Education from the Tedeschi review around investigators siding with the NSW Department of Education and not being impartial: *'if you're a part-time investigator, contracts are not secure, then you might be less inclined to go hard against the department if they feel as though they're not going to get another job, whereas if you have someone there full-time with tenure, they might be more inclined not to just tow the department line, but be more robust in their assessment of individual cases, so I think that is important'*. The barrister similarly added the benefits of having tenure: *'tenure can sometimes be important in ensuring objectivity and partiality, consistency and a healthy culture of looking at things through a critical lens'*. There were further concerns raised by the Tedeschi review that the barrister agreed with such as *'if you are just brought in once in a while, you're not necessarily immersed in that culture ... reviewers had very little teaching experience or know very little about education ... and there was no consistency in the treatment of cases'*. The Tedeschi review recommendations may go some way to resolving some of these issues of perceived bias with the internal decision-making systems at the department level above that of the school principal.

5.3.6 Complexity of Procedural Fairness

A sub-theme that came out of the interviews with the lawyers is the complexity of procedural fairness in not only the NSW Department of Education but also the whole of government. Lawyer Dion specifically addressed this with the comment that *'having some knowledge of procedural fairness adds so much value to a process and it stops or prevents or limits the risk of having to go back again and start again or having to undo an entire process because it's been flawed from the beginning, that's any public office, it does not matter whether it's state*

education, it's Department of Defence, Commonwealth, it's the whole public sector is rife with challenges on procedural fairness and in part because you look at a policy and a procedure and it's five pages long and it refers to numerous other guidance sheets and requirements and by the time you step through everything, and it's not human anymore'. Lawyer Dion identified that the complex nature of applying procedural fairness in decisions for any government decision-maker is challenging due to the number of reference materials and that a decision is often being made that adversely affects an individual, so the humanistic aspect of procedural fairness is lost and consequently, people become aggrieved with the process.

Similarly, Lawyer Gabe gave a real-life example of something that occurred on the day of the interview to illustrate that decisions made by the NSW Department of Education are complex in that there are many working parts for a decision to be made, and at times it may not be the principal making the decision about a student or family, but a team of professionals guided by the rules of procedural fairness: *'we had a decision that needed to be made, and we have health and safety there, we've got the child wellbeing unit, we've got the Director, Educational Leadership, school services, the counselling service, and also in part NSW health, and that's because these matters are complex, so you need to say in discharging procedural fairness, that's good, but there are other things you need to do, and manage the multi-pronged response, but saying to people that if you get the bones, that you say procedural fairness is the bare bones of the decision, then we can focus on the merits [of the decision]'*.

Lawyer Gabe gave another example of a hypothetical scenario where affording procedural fairness is difficult: *'often people are time poor or they are uncertain about how to proceed or they are dealing with some complexity: Student A does something to Student B on site and the pressure is on to suspend Student A, but the police are investigating, or Communities and Justice are investigating, and how do you manage that? How do you manage the elements? So how do you manage the elements of procedural fairness in circumstances where the police have said 'don't talk to them,' that's a genuine difficult issue to work through.'* Therefore, while the elements of procedural fairness may be easy for the courts to review and other government decision-makers may have the added luxury of time, in the high-pressure environment of the school, the principal must make a decision quickly to ensure the wellbeing of the school community. This may be at odds with the rules of procedural fairness. It could be suggested that a student in the above scenario be suspended immediately, but at the first available

opportunity that suspension is then examined and reviewed. For example, see *CF v The State of New South Wales*;⁷²³ *DM v State of New South Wales*⁷²⁴ and *McMahon v Buggy*.⁷²⁵

The barrister discussed the complexity of procedural fairness in employment matters, in that often the support person is a teacher's colleague from the same school and that colleague often does not want to get involved with the matter and as a consequence '*they tend to sit back and be quite passive or just want to play the minimum part and the consequences can be quite severe such as suspension, demotion or even removal from teaching; therefore, I think the process would be enhanced by having someone competent at the table early, and to ensure for both sides really ... that the forms as to procedural fairness are handed out at these things are actually adhered to*'. The barrister further commented in relation to having a support person that understands procedural fairness for the aggrieved party but also for the NSW Department of Education: '*I think it's in everyone's interest to have a competent support person at an early stage because it protects the principal and/or the person reviewing the conduct, but it also protects the rights of the employee and in that way no one really loses.*' With this level of complexity, it may signal to teachers and the NSW Department of Education that the advice of a support person should be in the interest of both parties; therefore, a staff member at the same school who comes under the same direct line from the principal may not be the best support person in these matters and someone external would be more appropriately placed. This could be a qualified lawyer, a union representative or someone who understands the rules of procedural fairness.

5.3.7 Internal Review

Whilst only one participant commented on internal review, this participant had worked as an in-house legal officer for several years, and addressed a critical issue in procedural fairness. Lawyer Gabe discussed procedural fairness from a systemwide approach within the NSW Department of Education beyond that of the principal. Lawyer Gabe discussed how principals become undone with their decisions: '*most of the way decisions are undone for principals and others is from process ... the decision may have merits, it might not, sometimes I wouldn't claim that every decision that's made has merit, but there's generally a willingness to look back at*

⁷²³ (2003) 58 NSWLR 135.

⁷²⁴ *DM v State of New South Wales* (Supreme Court of New South Wales, Simpson J, 16 September 1997) <<http://www.austlii.edu.au/au/journals/ANZJILawEdu/1998/18.pdf>>.

⁷²⁵ *McMahon v Buggy* (Supreme Court of New South Wales, Mahoney J, 28 December 1972), cited in Andrew Knott, 'Exclusion from School: Established and Emerging Issues' (1996) 1(1) *Australian and New Zealand Journal of Law Education* 75.

the process and don't ignore it, try and address the process issue. And if we don't have either the merits or the process then you can say that there's going to be an early apology, all those other sorts of things you try and do to restore the issue. But what will often happen is if there's a suspension which is probably a common example, so the principal suspends a student, and that suspension appeal will go to the Director, Educational Leadership, and that's often where they will ask for legal advice about what's happened, because the parent may raise a range of issues, is it a departure from the process.' Lawyer Gabe discussed broad examples where the DEL had been involved in reviewing the principal's decision in complying with procedural fairness and a parent discussing their views of the process at the school level. The parent might say, for example: *'You didn't tell me everything I needed to know, I didn't get a chance to talk to you beforehand, and so the director would say, "What's the legal position here?" and then we'll provide that advice to the director, and it's frank and fearless. So, if it has to be started again, then it will be started again. We are not there to make people happy; however, we would like to make people happy of course. So that's the issue, and of course, then you need to go back to fundamentals in those circumstances. And you're basing it on the complaint ... so what issue should be raised in the complaint either directly or indirectly that infer a process issue and identify it. So, what I have said to directors is, they are right, the parents are right, it should not have been done and we need to go back and undo it, and start again or possibly abandonment depending on what the issues are. That is my assessment of when they get it wrong, and I am talking about that skewed perspective.'* A recommendation with respect to reducing internal reviews is if principals are informed of the rules of procedural fairness, this may reduce the workload for the in-house NSW Department of Education Legal Services Directorate, or if reviews were to occur, it is likely that the outcome would fall in the principal's favour, which would have greater social outcomes in building trust with good government decision-making.

5.3.8 *Time Poor and Decision-Making*

It has been established by the Deloitte study⁷²⁶ that school principals are time-poor people; however, making decisions in accordance with the rules of procedural fairness is a time-consuming task. Such time-consuming tasks include notifying the parties, providing an opportunity to be heard and making an impartial decision based on the evidence. Lawyer Dion commented that *'what do you do when the teacher is in the corridor saying to you, "But I need*

⁷²⁶ Deloitte, *Principal Workload and Time Use Study* (Report, NSW Government, September 2017) <<https://education.nsw.gov.au/content/dam/main-education/gef/media/documents/Principal-workload-and-time-use-study-Nov-2017.pdf>>.

to talk to you now or I'll refuse to come to this meeting", you know, knowing how to manage it is probably key'. In addressing this issue of a time-poor environment Lawyer Finn commented that 'we try and make our resources available in as many places as possible because the principals are so busy ... they need to get to the bit that matters, and they need to be given time to be able to access that knowledge so then when the decision comes and someone is standing in front of them arguing, they don't have to put them on hold while they go and get the guidelines and read them and find the answer'. This would indicate that as part of their training in procedural fairness, principals would know where to access documents such as the legal issues bulletins⁷²⁷ before taking up the principal appointment in a school, as there would be insufficient time to read and act in such a pressure cooker environment as a school with an aggrieved parent, student or teacher.

Similarly, Lawyer Gabe stated in relation to being time poor: *'it's mainly the process, and often because people are time poor or they are uncertain to proceed or they are dealing with some complexity ... and if you try and unpick that when there's a statutory investigation, how do you discharge your duties because sometimes the community becomes aware of what's occurred, and there's a lot of pressure on the principal to take action. That's when you're appreciated and cover to take action quickly, that's when you miss some steps. I don't think there's any intention in the vast majority of matters, but I've seen sometimes steps are missed and I can understand why in that frame because people don't want the child at the school.'* Therefore, a recommendation in any training program to improve principals' abilities to perform the complex task of decision-making in accordance with the rules of procedural fairness would be to provide a hypothetical scenario and the principal participant would have a limited time to respond to simulate the real-world context. This sentiment was further enhanced by Lawyer Gabe who stated that *'people should understand the complexity within which the schools operate, that principals increasing demands on the principals time, that it needs to be recognition of the training, not just dealing with procedural fairness, but how to deal with difficult people with difficult behaviour, a number of the issues that go wrong in schools is a breakdown in interpersonal relationships, and also staff both current and former, and parents and students with mental health issues'*. Similarly, Lawyer Boyd stated that *'I am also conscious of the fact that they have a huge workload, and they are probably doing their best.'*

⁷²⁷ NSW Government, Department of Education, *Legal Issues Bulletins and Guidelines* (Web Page) <<https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins>>.

5.3.9 *Lawyer Perceptions on the Quality of Procedural Fairness in NSW Government Schools*

Understanding the complexity of how well NSW government secondary school principals undertake the fundamental elements of procedural fairness is challenging, as often these matters are handled outside of litigation and if they do proceed to litigation, they are often unreported decisions.⁷²⁸ Therefore, the only way to find out how well principals comply with the rules of procedural fairness is to ask the lawyers who are involved internally and externally to the NSW Department of Education. Lawyer Ares, who was interviewed in 2012, responded to this question that *'some deal with it very well, some don't like the advice they are given when they ask about it, and some don't ask for any advice and then you only hear about it when it goes pear-shaped'*. Lawyer Ares made one interesting observation that sometimes the same principal will seek legal advice from the legal directorate on different days in an attempt to speak with different legal officers and sometimes change the facts: *'so sometimes principals will ring up two or three different legal officers on different days and see if they get the same answer, and sometimes they will change the facts'*. However, Lawyer Ares stated that in general across 2,200 government schools with approximately 400 secondary schools, *'most of the time I think principals have a handle of things pretty well, and I think most of the time they're reasonably responsible and handle things pretty well'*. Therefore, in Lawyer Ares' view, principals do comply with the rules of procedural fairness well in their general day-to-day decision-making.

Similarly, Lawyer Boyd had a broader perspective of how principals are applying the rules of procedural fairness in decision-making: *'I think they could do it better, but I am also conscious of the fact that they have a huge workload, and they are probably doing their best'*, adding *'I've probably never seen any massive gross, incompetence in relation to applying the rules of procedural fairness.'* Lawyer Boyd gave two examples of where principals struggle with procedural fairness: *'the biggest thing I suppose I see is the failure to even engage an employee on a teacher improvement program, or in relation to students that probably should have gone through suspension that they don't ... it's more like not even going through those administrative procedures'*. This may add to the fact that a principal may not be familiar with their legal obligations around the elements of procedural fairness and rather than attempting to pervert the

⁷²⁸ See, eg, *CF v The State of New South Wales* (2003) 58 NSWLR 135; *DM v State of New South Wales* (Supreme Court of New South Wales, Simpson J, 16 September 1997) <<http://www.austlii.edu.au/au/journals/ANZJLawEdu/1998/18.pdf>>; *McMahon v Buggy* (Supreme Court of New South Wales, Mahoney J, 28 December 1972), cited in Andrew Knott, 'Exclusion from School: Established and Emerging Issues' (1996) 1(1) *Australian and New Zealand Journal of Law Education* 75.

course of justice, they simply fail to apply the elements in their decision-making. Further observations from Lawyer Boyd's experience are that sometimes principals *'disregard it, or it's too hard and they don't do it ... however, once they actually start the process, they do it fairly well because I think they get quite a lot of support from directors and they often get help from legal'*. Lawyer Boyd links back to the issues around the sheer volume of policies and identified that principals get *'very frustrated by the process'*. Lawyer Boyd's opinion of how well principals undertake the process of procedural fairness is that *'from all the hoops they have to jump through, principals are pretty good, well I mean, most of the time, they are pretty good'*. Lawyer Boyd gave an example around complaints handling: *'I think often schools get a lot of complaints and they probably should put them through our complaints handling policy or concerns policy in relation to employees and they don't, they might just respond ... The principal may not respond to everything in a complaint, they don't address all of the issues ... it's a bit casually dealt with'*; it should be formalised from the start of the process. This statement as to the quality of applying procedural fairness shows that principals are attempting to manage a large workload and principals simply do not have the capacity to put every complaint through the process, as suggested by Lawyer Boyd. This is where the principal can run into difficulty if the parent, student or teacher wants to seek a review of the principal's decision; the principal may have omitted the elements of procedural fairness. Finally, in holistically commenting on all principals in 2,200 schools (400 government secondary schools) in NSW, Lawyer Boyd addressed the complexity of dealing with so many decision-makers in that *'sometimes they might do it well, sometimes they might not do it well, depending on time or whatever'*. Therefore, there could never be a sweeping statement made about principals and their application of procedural fairness, rather some principals undertake the task of applying the rules of procedural fairness well and others do not. It must be reiterated that the principal participants in this study were experienced principals, and another study addressing new principals or a different group of principals may yield different results.

Lawyer Cain similarly stated: *'look, in 98% of cases principals do it very well and as lawyers we only hear about it after the event, sometimes, just anecdotally. In a couple of cases, they get caught up in the emotion, but in the main, they do it exceptionally well and the end result would have been no different had the lawyer got involved at an earlier stage. I think they apply procedural fairness pretty well particularly for the run of the mill type problems, I think schools have got those well and truly under control.'* However, Lawyer Cain went onto discuss more complex issues where principals may have difficulties applying the rules of procedural fairness:

'there is a level of knowledge now that they require that they didn't have back then, and they're sorting out those problems, those that didn't get sorted out then are generally the trickier, more complex issues that ended up on the lawyer's desk'. This may go some way to identifying that school principals need a comprehensive understanding of procedural fairness, not only to manage mainstream issues such as short suspensions but also to apply those principles in several different contexts. The issue may stem further in that head teachers/assistant principals, deputy principals, principals and DELs all require some understanding of the application of procedural fairness when making decisions that may adversely affect an individual or group of individuals.

Lawyer Dion responded to this question focusing on the policies and processes within the NSW Department of Education by commenting that the policies and processes are ingrained with the elements of procedural fairness, so if a principal complied with the policies and processes, they would be complying with the fundamental elements of procedural fairness. Lawyer Dion stated that *'the best thing that principals can do to afford procedural fairness is to follow the policies and procedures that are in place for them, which are mapped out in those various guidelines and requirements. Procedural fairness is, at the end of the day, very much fairness, a look and feel, and so it does not matter from a legal perspective necessarily if you don't cross your T's and dot your I's perfectly on those policies and procedures. At the end of the day if it's going to be reviewed by a court or tribunal, they'll look at overall the key requirements of was there an opportunity to understand the issue and to respond? Was there sufficient impartiality and independence in whatever process and that's sometimes where principals can get tripped up on allegations of lack of independence or conflict of interest. And overall, was the process one that was fair and reasonable to a reasonable person standing back and looking at it in hindsight?'* Therefore, in Lawyer Dion's view, provided that the principal complied with the policy and procedures set by the NSW Department of Education, the principal would be affording affected parties' procedural fairness, even if there were small breaches to how a lawyer may apply those rules.

Lawyer Ezra, who is an independent lawyer external to the NSW Department of Education, when asked about the quality of procedural fairness afforded by principals responded with: *'it varies enormously. If I am dealing with a principal of a large school with 1,500–2,000 students, and a couple of different employing entities, and a sophisticated foundation structure, and decades of experience managing, then they may or may not understand the principles, they may not understand the principles, they may not understand the concept of procedural fairness as a*

legal concept, but they understand ideas about basic fairness and doing things in accordance with legal requirements.’ Furthermore, principals of large schools often have more experience and resources at their disposal: *‘the bigger schools are more likely to employ people that have got more experience, the bigger schools are more likely to employ people that have more academic qualifications as well ... and they have the resources to employ the better qualified people’*. What Lawyer Ezra articulated here is consistent with Gleeson J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*⁷²⁹ in that principals, in executing their decision-making power, understand the basic idea of fairness, that is, what is fair in the given circumstances for all parties involved. This links back to wellbeing within the school community, that is, it may not be fair to have a student at school if another student’s learning is affected.

Furthermore, Lawyer Ezra discussed those principals of large schools who often have more experience: *‘even if they do not understand procedural fairness, very often the more experienced ones in those big schools will know what procedural fairness is, roughly speaking. It may even be reflected in some of their policies, and anyway, they have an idea of fairness, let’s say in employment contracts, which is what I deal with most often, or the discrimination context, or disciplining kids. They know there’s an issue of fairness in terms of people being heard, and not being seen to prejudge the issue.’* This further demonstrates that principals need to understand the policy requirements and how to apply procedural fairness when executing those policies and procedures in certain circumstances. Lawyer Ezra discussed how well the NSW Department of Education applies the rules of procedural fairness: *‘the matter that comes to mind that I was involved in was actually not about a school matter, but a matter within the department itself. About procedural fairness in the way a senior member of staff was dealt with in the department ... it was a complaint by a teacher in a school against people in the department headquarters who were dealing with performance and the complaint was totally unfounded ... the department knew exactly what it was doing and did a really good job of doing things in a procedurally fair way.’* This links back to the Tedeschi review⁷³⁰ and is contradictory to the findings of the Tedeschi review with respect to its review of EPAC.

⁷²⁹ (2003) 214 CLR 1.

⁷³⁰ Mark Tedeschi AM QC, *Review into the Functions and Operations of the Employee Performance and Conduct Directorate (EPAC) within the New South Wales Department of Education* (Final Report, June 2019) <<https://www.education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/media/documents/EPAC-Report-2019-Final-Secured.pdf>>.

Similarly, Lawyer Finn, who is an internal NSW Department of Education lawyer, spoke in relation to how well principals undertake the complex task of applying the rules of procedural fairness: *'I would say that principals apply the rules of procedural fairness well, but honestly it is variable ... Sometimes in the conversations that I have with them, they are not necessarily following every step in the policy, but as a general rule, I think they are fairly across the policies ... when we are talking about principals, I would find it variable with what kind of principal we are talking about, whether it is a deputy principal who's relieving and has not done that before, then I have to step them through the steps a lot more.'* Further, Lawyer Finn commented that those principals who do ring regularly are knowledgeable about the rules of procedural fairness, noting that *'the people who are ringing are our frequent flyers and they are pretty good, they ring a lot, and they often know what the answer is going to be'*. Lawyer Finn is consistent with some of the previous comments made by other participants in that deputy principals require training in procedural fairness and that it is about the lived experience of having been through this process in an educational context. Lawyer Finn does talk about the complexity of managing 2,200 schools in NSW in that some principals call the legal services for assistance while *'we don't hear from some because they know what they are doing, or we don't hear from them because they don't know to ask and they are doing it their own way'*. This is concerning because if principals are not applying the rules of procedural fairness in matters that affect an individual, when that aggrieved person goes to appeal the process, the principal's decision is likely to be overturned by the DEL or by a tribunal or court.

Lawyer Gabe made similar comments in relation to the quality of procedural fairness of principals in the NSW Department of Education: *'I think it would be fair to say that some do it well and some don't ... I would suspect as not every principal in every school is contacting us every day, some principals must be doing it right, but some do have difficulties.'* However, Lawyer Gabe also made the observation that *'not too many principals would contact legal services with a decision that everyone is happy with ... we only get the calls where things haven't gone as well as they could have, and a number of times the process has not been followed, and that's where the merits of the decision are fine, but the process has not been followed ... this is in the proportion that end up at legal services and not what is generally happening in schools'*. This statement may go some way to demonstrate that in the thousands of decisions made daily by government secondary school principals; only in a small number of instances does the legal directorate become involved. Therefore, there must be a sound mechanism being applied at the DEL level in that principals are being counselled when required

on the application of the rules of procedural fairness. However, when this goes wrong, the outcomes for both the school and the NSW Department of Education can be significant.

Lawyer Gabe discussed the practical implications and the extreme conditions in which school principals must make decisions in accordance with the rules of procedural fairness: *'there are some difficulties inherent in working in a school that impact on their ability to provide procedural fairness on some occasions ... I was dealing with a matter where there were some students with challenging behaviour, and the principal had immediately jumped to, "They're not going on the excursion to Canberra", and had not unpacked whether the main starting point is the students will go and let's talk about how that can happen and why it might not be able to. So in that circumstance the parents were saying, "We'll go to the Ombudsman because this is unfair", you have an argument as an opportunity to be heard about this certain significant impact on the child's education and it's also a breach or discrimination or in circumstances a fail to consult and they were completely right on both occasions ... so we need to go back to those first principles and have that conversation because it's not a legally sound decision to make, it won't be upheld ... and if you think the parent's difficult to deal with now, give them that outcome.'* This gives a clear example of where a principal was not complying with the rules of procedural fairness and consequently their decision is likely to be overturned and the principal is now in a position of attempting to save face. Finally, Lawyer Gabe gave another example of situations where principals find it challenging to afford procedural fairness: *'[Where] there is a statutory investigation (eg child protection matters), how do you discharge your duties because sometimes the community becomes aware of what's occurred, and there's a lot of pressure on the principal to take action. That is when you are appreciated and cover to act quickly, that's when you miss some steps. I don't think there's any intention in the vast majority of matters I've seen, but sometimes steps are missed, and I can understand why in that frame because people don't want the child at the school, etc.'* Consequently, unlike other government officers in immigration matters for example, principals need to make decisions quickly while still providing the elements of procedural fairness. These two may be at odds with one another, as procedural fairness, ample time and opportunity need to be afforded to the affected person.

Lawyer Gabe was asked about the DEL's understanding of procedural fairness as the DEL is the principal's supervisor and they are often the first person the principal seeks advice from beyond their principal network colleagues; therefore, the principal in consultation with the DEL

is still able to maintain control over the decision affecting the school community. Lawyer Gabe responded as to the knowledge and understanding of DELs in that *'it varies, and the same thing ... DELs who manage these, I find that most DELs that ring us, have got a pretty good grasp, in particular experienced ones because they are seeing the mistakes that other people make, and you learn from other people's mistakes, and they are having to review it'*. Where Lawyer Gabe identified a gap in understanding the principles of procedural fairness is *'probably the relieving DEL while the substantive DEL is off doing something, is less capable than the experienced one ... it's not necessarily intuitive, it's about understanding the process ... it's not a tick box, it's got a purpose and missing the box means it can have an impact whether the decision can be upheld at the end of the day ... Therefore, I would say DELs vary like all good people, it will depend on what they have done prior.'* Lawyer Gabe also mentioned that secondary school principals are often more equipped than primary school principals by the very nature that secondary schools are more likely to suspend or expel students compared to primary schools: *'if you don't know the process, then you are not necessarily going to be looking for what a lawyer looks for'*. Finally, Lawyer Gabe believed that some additional training and support may improve the principal's and the DEL's ability to afford procedural fairness within the NSW Department of Education: *'it would be good to see principals and DELs get some assistance in these suspensions, expulsion procedures, and I do think there would be some work to do there'*. This may subsequently save the principal, the DEL and the NSW Department of Education significant time when the principal gets it wrong as *'there is a lot of energy and time and angst that needs to be put into resolving it, and that's not from legal, it's from the principal'*.

The barrister discussed the quality of procedural fairness from the principal's perspective; however, they spoke more broadly about the NSW Department of Education affording procedural fairness in industrial relation matters. When asked whether principals undertook the process of procedural fairness well, the barrister responded with *'there are some principals that do it very well; however, I tend to almost by definition, given what I do, I tend to become involved when shit's hit the fan, but I am sure some people are doing it very well ... and there are some very good lawyers and investigators in the department who I imagine have an interest in ensuring that principals are properly trained in these areas because at the end of the day, if principals are doing things correctly, there's less work for them'*. Talking broadly, the barrister mentioned the time frame for completing investigations within the department of which the principal may be involved: *'sadly a lot of these investigations are lagging and that's a huge problem as one of the big issues around procedural fairness is timeliness and the department*

it would seem, on any objective measure has struggled on that front'. However, the barrister's clients 'would normally be alleging that there has been some kind of breach of procedural fairness and so in my experience, in relation to those cases, that it has not been done as well as it might have been ... my clients have had concerns where they were not given an opportunity to voice their side of the story ... In my experience dealing with a very small stratum of individuals and in those cases my experience has been that it has been done poorly.' Therefore, it is challenging to ascertain whether NSW government secondary school principals undertake the function of applying the rules of procedural fairness well given the sheer number of NSW government schools (2,200 schools of which approximately 400 are secondary schools).

In *Kent v Secretary, Department of Education*, Commissioner Murphy stated:

I reject entirely the applicant complaints that the Teacher Improvement Program which he underwent in 2017 was, in some way, conducted in a manner which was unfair to him or that he was denied procedural fairness. I find that each of the persons who was involved in the program, including Mr Ward, conducted themselves in a professional and unbiased manner in a genuine attempt to assist the applicant to improve his teaching performance. Unfortunately, and not through any fault of theirs, those attempts did not prove fruitful.⁷³¹

This case highlights that the NSW Department of Education did comply with the elements of procedural fairness in this matter, namely, the fair hearing and unbiased decision-maker, as discussed in Chapter 3.

5.3.10 *Conclusions and Key Findings — Theme 1: Procedural Fairness in Policy and Procedures*

Principals in NSW government secondary schools were generally viewed as having a sound knowledge of the rules of procedural fairness; however, as reported, if the principal did not follow the rules of procedural fairness or had blatant disregard for the principles of procedural fairness, this is where their decisions may be reversed by a superior officer, or in extreme cases, by tribunals or courts. One of the key findings of complying with the rules of procedural fairness was the time-consuming nature of affording procedural fairness or when a decision had to be made quickly, such as in the suspension of a student; this added to the duties undertaken by the school principal, who is already time deficient. Furthermore, principals were often found to be frustrated with the amount of procedural fairness, even when dealing with matters of a trivial nature. Finally, it was found that principals need to understand a complex array of laws,

⁷³¹ [2019] NSWIRComm 1001, 90.

policies, procedures and guidelines in applying the rules of procedural fairness in their schools while always being open to review from DELs (the principal's supervisor) or external bodies such as the ombudsman, tribunals or courts. The key findings can be broken down as follows:

- The responses from all principal participants for the most part complied with the rules of procedural fairness by following the relevant policies, procedures and guidelines as set out by the NSW Department of Education.
- The principal participants appeared to be frustrated with the length of time required to afford a person procedural fairness, particularly in relation to underperforming staff, as all the principal participants were of the view that this affected the wellbeing and education of students, which the principal participants viewed as being of the highest priority.
- The principal participants found the compliance requirements of procedural fairness to be particularly challenging since in a school environment several incidences can occur simultaneously. This was mostly focused on industrial relation matters; however, the challenging compliance requirements also provided for a comprehensive discussion in student discipline. Of note though, it did not occur as frequently in issues of special education; this may be because more time is available to the principal in providing for a student with special needs.
- The DEL discussed the time-consuming nature of checking that principals had complied with procedural fairness in their decision-making when reviewing complaints. Of significant note is that the DEL participant stated that reviewing principals' decisions is a weekly task and is not on an ad-hoc basis.
- Several of the participants mentioned that good government decision-making needed to be fair and thus affording procedural fairness was seen as positive despite its complex and time-consuming nature for the school principal.
- The perception of bias as discussed by two of the lawyer participants occurred mostly in two situations. This was of particular concern in small/rural/remote schools where a team to conduct the investigation may be limited. The barrister commented on several occasions of the challenges for a principal to be unbiased and confirmed some of the findings from the Tedeschi review⁷³² around employment law matters. Lawyer Gabe

⁷³² Mark Tedeschi AM QC, *Review into the Functions and Operations of the Employee Performance and Conduct Directorate (EPAC) within the New South Wales Department of Education* (Final Report, June 2019) <<https://www.education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/media/documents/EPAC-Report-2019-Final-Secured.pdf>>.

provided examples of how the NSW Department of Education manages complex situations where a perception of bias may exist.

- Several of the lawyer participants discussed the complexity of procedural fairness for not only government departments but also the NSW Department of Education. The challenge for the NSW Department of Education is that decisions often need to be made quickly to ensure the wellbeing of the school community. Additionally, education systems are complex and often require several government agencies to provide expertise when decision-making.
- One of the lawyer participants discussed the internal review processes from an appeal following a principal's decision. An area of further investigation would be to ascertain how well the DEL complies with and understands the rules of procedural fairness, and their views on reviewing principals' decisions.
- Several of the lawyer participants mentioned the time-consuming nature of affording procedural fairness in decision-making. Consistent with the literature discussed in Chapter 2, the demands on the school principal are becoming super-human. However, the lawyer participants commented that decisions needed to be made quickly and principals did not have the luxury of time to consult the relevant policies, procedures and guidelines or their colleagues and supervisors; they just needed to know.
- All the lawyer participants found that in most cases, NSW government secondary school principals provided procedural fairness effectively in matters involving students, parents and teachers. This appears to be inconsistent with the findings of other Australian studies⁷³³ that sought to identify principal's legal literacy; all three studies found that principals lacked the legal knowledge required to undertake their roles effectively. Moreover, the data from this study is derived from limited interviews and cannot be generalised. Therefore, how principals are understanding and applying the rules of procedural fairness in NSW government secondary schools may be of benefit in other Australian jurisdictions.
- Mention was made by some of the principal participants that the DEL's understanding of procedural fairness varied considerably depending on the DEL's lived experience

⁷³³ Douglas Stewart, 'School Principals and the Law: A Study of the Legal Knowledge needed and held by Principals in Government Schools in Queensland' (PhD Thesis, Queensland University of Technology, 1996); Paul McCann, 'Principals' Understanding of Aspects of the Law Impacting on the Administration of Catholic Schools: Some Implications for Leadership' (PhD Thesis, Australian Catholic University, 2006); Allison Jane Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017).

and whether they had been a primary or secondary school principal. Several of the participants mentioned that secondary principals often had a greater knowledge of the rules of procedural fairness than primary school principals as they were more likely to have suspended or excluded students.

- Lawyer Gabe summarised the overall position of the NSW Department of Education as follows: *‘I would suspect as not every principal in every school is contacting us every day, many principals must be doing it alright.’* This was reflected by the barrister participant who discussed their skewed view of principals providing procedural fairness as they only dealt with matters when the situation had gone poorly.

5.4 THEME 2: STUDENT WELLBEING AND PROCEDURAL FAIRNESS

Student wellbeing is one of the themes derived from the research interview data. The NSW Department of Education is committed to providing a ‘wellbeing framework for schools [that] supports schools to create learning environments that enable students to be healthy, happy, engaged, and successful’.⁷³⁴ The term ‘wellbeing’ is described by the NSW Department of Education as follows: ‘In very broad terms, wellbeing can be described as the quality of a person’s life. Wellbeing needs to be considered in relation to how we feel and function across several areas, including our cognitive, emotional, social, physical, and spiritual wellbeing.’⁷³⁵ Resources are available to school principals in developing the concept of wellbeing within their school, which are set out in the following major categories:⁷³⁶

- ‘attendance, behaviour and engagement;’
- ‘child protection;’
- ‘counselling and psychology services;’
- ‘health and physical care;’
- ‘whole school approach;’ and
- ‘external wellbeing providers.’

⁷³⁴ NSW Government, Department of Education, *Student Wellbeing* (Web Page) <<https://education.nsw.gov.au/student-wellbeing>>.

⁷³⁵ NSW Government, Department of Education, ‘Wellbeing Frameworks for Schools’, *Student Wellbeing* (Web Page) <<https://education.nsw.gov.au/student-wellbeing/whole-school-approach/wellbeing-framework-for-schools#What0>>.

⁷³⁶ Ibid.

The wellbeing framework for schools sets out a range of contexts in which wellbeing is experienced:⁷³⁷

- cognitive wellbeing — achievement and success;
- emotional wellbeing — self-awareness and emotional regulation;
- social wellbeing — experience of positive relationships with others;
- physical wellbeing — feeling physically safe and healthy; and
- spiritual wellbeing — a sense of meaning and purpose (beliefs, values and ethics).

Pollard and Lee identified five distinct domains of wellbeing from a systemic review of the literature, namely, physical, psychological, cognitive, social and economic.⁷³⁸ White and Kern discussed the essential reasons as to why the wellbeing of students is important in an education system for the development of students as active members of society.⁷³⁹ Philosophical, psychological, social, cognitive, economic and cultural elements construct the framework to describe the promotion of a positive education in developing wellbeing for students.⁷⁴⁰ Article 12 of the United Nations Conventions on the Rights of the Child (‘UNCRC’) gives rise to the child having a voice in their wellbeing depending on the age and capacity of the child; Article 3 identifies that ‘the best interest of the child shall be a primary consideration’; and Article 40 mentions children’s wellbeing in relation to educational institutions in providing appropriate alternative education and training to children.⁷⁴¹

The Australian Child Wellbeing Project found that policy action is required to improve the wellbeing of young people, particularly those of secondary school age, through mentoring.⁷⁴² Powell et al’s large-scale research project in Australian schools to determine students’ understanding of wellbeing yielded three main areas: ‘being’, ‘having’ and ‘doing’.⁷⁴³ Students voiced their opinion that as part of the wellbeing piece, they had to have some ability to be

⁷³⁷ Ibid.

⁷³⁸ Elizabeth L Pollard and Patrice D Lee, ‘Child Well-being: A Systematic Review of the Literature’ (2003) 61(1) *Social Indicators Research* 59.

⁷³⁹ Mathew White and Margaret L Kern, ‘Positive Education: Learning and Teaching for Wellbeing and Academic Mastery’ (2018) 8(1) *International Journal of Wellbeing* 1.

⁷⁴⁰ Ibid.

⁷⁴¹ *Convention on the Rights of the Child*, opened for signature, ratification and accession 20 November 1989 (entered into force 2 September 1990) <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>.

⁷⁴² Gerry Redmond, Jennifer Skattebol, Peter Saunders, Petra Lietz, Gabriella Zizzo, Elizabeth O’Grady, Mollie Tobin et al, *Are the Kids Alright? Young Australians in their Middle Years* (Final Summary Report, Australian Child Wellbeing Project, February 2016).

⁷⁴³ Mary Ann Powell, Anne Graham, Robyn Fitzgerald, Nigel Thomas and Nadine Elizabeth White, ‘Wellbeing in Schools: What do Students Tell Us?’ (2018) 45(4) *The Australian Educational Researcher* 515.

involved in the decision-making process about the outcomes faced.⁷⁴⁴ The National Children's and Youth Law Centre conducted a survey of 66 young people suspended or expelled from school which found that many students are not told their rights during the disciplinary process or made aware of the ways to challenge the decision.⁷⁴⁵ This would be consistent in applying the rules of procedural fairness by allowing the student to be heard prior to any decision being made in relation to their behaviour. Finally, the AITSL principal standards require a principal to address wellbeing through community engagement: 'Principals work with other agencies to support the health, wellbeing and safety of students and their families.' There are 12 references to wellbeing in the AITSL principal standards, which relate to self, students, teachers and others. This is consistent with the Deloitte study, which found that due to an absence of a duty statement, principals adopted the standards to formulate a duty statement defining their roles and responsibilities.⁷⁴⁶

5.4.1 *Sub-Theme: Student Behaviour Management*

The participants were asked what their application of procedural fairness would be in student discipline matters. The responses are from the vignette, and principal and lawyer lived experiences.

5.4.1.1 Secondary School Principals

Student wellbeing was reflected in the participants' comments on managing student behaviour, specifically in relation to exclusion from school. Suspensions from school are governed by the *NSW Department of Education Suspension and Expulsion of School Students: Procedure 2011*, which states that all students have the right to be treated fairly and with dignity in an environment free from disruption.⁷⁴⁷ As such, suspensions and expulsion are options available to the principal in situations where a student might be removed from the school environment in cases of unacceptable behaviour that affect the interests of the school and staff.⁷⁴⁸ One of the key elements when deciding whether to suspend a student is the wellbeing of that student. The

⁷⁴⁴ Ibid.

⁷⁴⁵ Australian Government, Australian Law Reform Commission, *Disciplinary Measures* (Web Page) <<http://www.alrc.gov.au/publications/10-children-education/disciplinary-measures>>.

⁷⁴⁶ Deloitte, *Principal Workload and Time Use Study* (Report, NSW Government, September 2017) <<https://education.nsw.gov.au/content/dam/main-education/gef/media/documents/Principal-workload-and-time-use-study-Nov-2017.pdf>>.

⁷⁴⁷ NSW Government, Department of Education & Communities, 'Suspension and Expulsion of School Students: Procedures 2011' (Web Page) <https://policies.education.nsw.gov.au/policy-library/associated-documents/suspol_07.pdf>.

⁷⁴⁸ See, eg, *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

NSW Department of Education ‘Values in NSW Public Schools’ policy guides student welfare and discipline and how the school community can provide opportunities for student, staff and parents to participate in decision-making.⁷⁴⁹

The principal participants were asked what they would do when suspending a student for misconduct. In managing student behaviour, the principals gave the following examples of considering the wellbeing of the student/s involved in the incident.

Principal Beau stated that in relation to students smoking cannabis that *‘it would be an IRS reporting incident and then they tell you probably child wellbeing and it goes on forever’*, meaning that the process to comply with a reportable incident such as cannabis was a very time and labour-intensive process for the principal. Principal Beau was familiar with the law, in that they did not have the power to search the individual students: *‘I would ask them to empty their bags, but they are so smart, they hide it in their socks apparently.’* This was consistent with a legal issues bulletin developed by the NSW Department of Education around the powers to search students and that of the UNCRC, which gives rise to certain human rights to the student.⁷⁵⁰ Principal Beau provided several other examples of where student wellbeing was at the forefront of their decision-making. As a government school, Principal Beau is required to enrol all students in the locality, some of whom arrive at the school with criminal records and/or may be out on bail: *‘there’s a huge amount of stakeholder consultation, huge amount of risk management planning, a huge amount of preparation before those kids actually even go into classes and they always need extra learning and welfare support’*. This relates to wellbeing in three ways: 1) ensuring the wellbeing of the child charged with a criminal offence by providing them with an education; 2) ensuring the wellbeing of the other students in the school that the criminally charged student may encounter; and 3) ensuring the wellbeing of the staff at the school who are involved with the child.

Another example Principal Beau provided around student wellbeing is when a fight occurred and the student was so severely injured he could not even talk and had a suspected broken jaw and lost several teeth. Principal Beau commented that the suspension policy is at odds with what might be considered in the best interests of a student: *‘in this case it is an interesting*

⁷⁴⁹ NSW Government, Department of Education, ‘Values in NSW Public Schools’, *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library/policies/values-in-nsw-public-schools>>.

⁷⁵⁰ NSW Government, Department of Education, ‘Power to Search Students’, *Legal Issues Bulletins and Guidelines* (Web Page) <<https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/bulletin-6-power-to-search-students>>.

procedural issue, you have to go through the suspension procedure, and you have to suspend the boy who was badly injured, because he was involved in starting the fight and he didn't fight back, so he's suspended as well'. Principal Beau was concerned for the safety of students at the school and stated, 'how do I make these kids safe?' One tragic situation for Principal Beau was when a student was sexually assaulted by another student in the school. Principal Beau was concerned for the wellbeing of the victim: 'in the end I went with the [advice] of the child wellbeing unit'. Unfortunately, in this situation, Principal Beau was given external advice not to suspend and was advised to let a third party 'know if anything is going on with the kid [victim]'. In this instance Principal Beau was never able to suspend, meaning the wellbeing of the victim in attending the school may have been compromised, and Principal Beau felt unable to deliver a sense of social justice to the victim, albeit if only a short suspension.

Principal Cole looked at the seriousness of the incident and the age of the students, stating that *'look, I would have to be very seriously convinced that there were ongoing nasty implications for those students to not be allowed to sit their HSC', and 'everybody makes mistakes'. Principal Cole considered the wellbeing of each student when making a decision that might affect an individual by looking at how much of a 'vested interest' that student may have in a rugby final etc, as this could be used for university admittance or selection in a professional football team. Principal Cole, while having to follow policy, noted that they would 'report it to the police' because 'you're not allowed to have drugs at school', and they would also do a child wellbeing report, which looks at the welfare of the student. In other discipline examples, Principal Cole maintained the wellbeing of the students by first 'considering context, taking into account the student's previous record, whether there's any learning disabilities, and all of those kinds of things'.*

The DEL undertook a more comprehensive approach to dealing with physical assault at school. The DEL spent a significant amount of time looking into the individual circumstances of each student and what might contribute to their behaviour. The DEL stated that *'I would take into account such factors as, the age of the students, I would also look at the background of the students, what led up to that happening? Do those students have any learning support needs? Are there any disabilities within those students that the students have? For example, there might be a situation where this has come from an emotional issue, or what other students might have said to this student.'* They also looked into the seriousness of the fight and what injuries had occurred to each student: *'so you take into consideration were there any injuries ... so you're*

bringing in the wellbeing as well. The DEL sought solutions that were of value to the individual concerning wellbeing, by asking ‘*[D]o they have a disability, are they receiving support, do we need to look at the type of support they are receiving and revisit that?*’ The DEL also gave weight to a rugby final, which considered the individual interests of a student, commenting that those parents may well think ‘*isn’t what I am doing on the Saturday just as important as the HSC, so that needs to be taken into consideration also*’.

Principal Duke differed in their approach in that in a case involving illegal drugs, they just called the police and let them manage the incident: ‘*the last thing you want is a cover-up*’. However, in other examples, Principal Duke gave students an opportunity to change their behaviour: ‘*We give an intention to suspend first, that’s the first instance to give people time to think about what they are doing and maybe change their behaviours before it gets to a suspension or expulsion stage.*’

5.4.1.2 Summary of Student Behaviour Management — Principal Perspective

Principals Beau and Cole took similar approaches when seeking to suspend students from the school in that the wellbeing of the student was one of the top priorities. The DEL took a far more thorough investigation into the wellbeing of the student; due to their experience as a principal and then as the mentor, supervisor and reviewer of the principal’s decisions, they were able to reflect on what some of the elements are when caring for students in government schools. The DEL’s level of inquiry may also be possible since the DEL has more time to review the learning needs of a student as matters surrounding suspension are often only escalated in the most serious matters or where the parents or students have sought a review of the principal’s decision. Principal Duke’s approach was to contact the police immediately on matters of a criminal nature in the school such as smoking cannabis and theft. However, for less serious matters or matters that were not of a criminal nature, Principal Duke gave the students an opportunity to change their behaviour prior to being suspended or expelled, which gave them some control over the outcome and may have improved their sense of self (self-efficacy/self-wellbeing). Principals Beau, Cole and Duke consistently applied the policy of applying zero tolerance for drugs in NSW Department of Education schools.⁷⁵¹ The ‘Drugs in Schools: Procedures for Managing Drug Related Incidents’ as a general principle states: ‘The immediate

⁷⁵¹ NSW Government, Department of Education, ‘Drugs in Schools Policy’, *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library/policies/drugs-in-schools-policy>>.

priority in any drug related incident is to ensure the safety and welfare of students and staff.’⁷⁵² The responses provided by the participants demonstrated that the principals and the DEL interviewed in this study are genuinely concerned for the wellbeing of their students and staff in their decision-making. As part of the discipline process, the principal participants gave students the opportunity to change their behaviour, which is consistent with the hearing rule as students were able to explain why they were behaving in a particular manner.

5.4.1.3 Education Lawyers

In-house lawyers and lawyers external to the NSW Department of Education were also asked about the procedures and processes undertaken when dealing with student suspensions. All three lawyers who referred to student discipline in their responses referenced the suspension and expulsion policy, and strongly articulated that in a few exceptional cases, there was no obligation on the school principal to suspend a student, rather it was a discretion.

Lawyer Boyd when dealing with student discipline matters considered the complexity in situations where a student is displaying violent behaviour. Lawyer Boyd looked at the problem as a whole: *‘[Y]ou’ve also got suspension [which] is a big problem because a lot of the kids who have attendance issues, they then just come to school even though we get them back into school, they come back to school and either get themselves suspended so they don’t have to go to school again, or unfortunately their behaviour is quite bad and they just get suspended again.’* Similarly, Lawyer Boyd focused on the issue around wellbeing: *‘[I]t’s not always the best outcome for the student because they’re then excluded from the school and they get behind, particularly in high school, who knows if the work is being done.’* Lawyer Boyd further added that in providing for the wellbeing of a student, often it is just moving the problem from one school to another and the NSW Department of Education has an *‘obligation to help them find a new school. Which can be difficult because then particularly if they have a history of violence, then other schools don’t have to accept them necessarily.’*

Lawyer Finn dealt with attendance issues and seemingly took a holistic approach when dealing with not only the student but also the family in catering for the wellbeing of the student. Lawyer Finn commented that *‘in attendance [there] is sometimes too much procedural fairness’* and often *‘the [schools] don’t want to alienate the families, and they think they can work with them*

⁷⁵² NSW Government, Department of Education and Training, ‘Drugs in Schools: Procedures for Managing Drug Related Incidents’
<https://policies.education.nsw.gov.au/policy-library/associated-documents/drugs_schools.pdf>.

to get their attendance back up'. However, Lawyer Finn commented that often by the time the attendance matter reached the Legal Services Directorate it was too late, and the wellbeing of the student had been compromised. Lawyer Finn commented that *'by the time it gets to the program, through the program and then to me, it's too late, the kids haven't been in school for a few years and there not going back'*. Furthermore, Lawyer Finn's view to improve the wellbeing of student attendance was that *'I would like to see a shorter time frame of procedural fairness'*. To improve the wellbeing of students within the NSW Department of Education, Lawyer Finn stated that *'I try to encourage my schools to do in-school suspensions'*, and further added: *'if we're trying to have these kids at school, they are trying to not be at school, so if they're trying to get themselves suspended, it's working, you're playing right into it, it's a little frustrating'*. Similarly, Lawyer Finn understands that wellbeing needs to be looked at from the perspective of both the school and the student: *'I guess there's a balance in there of principals using suspension-expulsion policy to suit their own needs for the schools, which might not be the needs for that family, my focus is on that family.'*

Lawyer Gabe discussed the wellbeing of students in creating an inclusive school, reflecting on a relevant matter from 2019 around some students with challenging behaviour and the principal had made a decision that the students were not permitted to go on a school camp: *'[T]he principal had immediately jumped to, "They're not going on the excursion", and hadn't gone and unpacked whether the main starting point is they will go and let's talk about how that can happen and why it might not be able to'* and *'you have an argument as an opportunity to be heard about this certain significant impact on the kids' education and it's also a breach or discrimination or in circumstances a fail to consult.'* In advising the principal in relation to this excursion, which had significant learning outcome benefits, Lawyer Gabe guided the principal to firstly consider the wellbeing of the students in being able to be a part of this excursion, and then if the student could not partake in the excursion and the learning outcomes, what other provisions would be made to engage this student.

5.4.1.4 Summary of Student Behaviour Management — Lawyer perspective

Lawyers Boyd, Finn and Gabe all focused on the wellbeing of the student and/or their family in discipline matters. This further adds to the focus of the NSW Department of Education in instilling a values approach to education, particularly in care, which is concerned with the

wellbeing of oneself and others, demonstrating empathy and acting with compassion.⁷⁵³ The process appeared to involve a significant amount of consultation with the parties prior to any final decisions being made. This is consistent with the hearing rule, discussed in Chapter 3, as the affected individual is given the opportunity to present their case prior to a decision being made by the principal. Finally, when dealing with student wellbeing, cooperation between the different directorates within the NSW Department of Education was demonstrated by the research participants.

5.4.2 Sub-Theme: Inclusion

The NSW Department of Education is committed to providing an education to all students regardless of disability:

Every NSW public school has a learning and support team that works with students, parents and carers, classroom teachers and other professionals to identify students who need extra support — at any stage of a student’s school life.⁷⁵⁴

The NSW government secondary school principals and the DEL were asked what their process would be when enrolling a student who had learning disabilities and Asperger’s syndrome, and what provisions would be made in providing for the education of this student

5.4.2.1 Secondary School Principals

All three principals and the DEL advised that if the student was within the catchment area, then the student would be enrolled. The DEL stated that *‘if they were living in the local area, then we’d enrol them, that’s just policy’*. Principal Beau, due to the size and constraints of their school, advised that *‘provided they’re local, I won’t take non-locals; I would have them present at the enrolment interview and I would bring up one learning and support teacher’*. Principal Cole added that *‘if they’re in area, they’re automatically enrolled ... if they’re out of area, I’ll just follow our regular enrolment procedure for out of area kids’*. Principal Duke went further and commented that at their school *‘situationally we just get kids turning up what you call double exceptionality in our case’*, which means that the student has a disability, but is also

⁷⁵³ NSW Government, Department of Education, ‘Values in NSW Public Schools’, *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library/policies/values-in-nsw-public-schools>>.

⁷⁵⁴ NSW Government, Department of Education, *Disability, Learning and Support* (Web Page) <<https://education.nsw.gov.au/teaching-and-learning/disability-learning-and-support/programs-and-services/learning-and-support>>.

very intelligent or gifted in a particular area.⁷⁵⁵ Again, Principal Duke inferred that as they are within the local catchment area, the school has an obligation to enrol and provide for those students.

The DEL discussed the processes of enrolling a student who is outside the catchment area and stated that *'it is the same except the only difference is that they would go through a process of applying for an out-of-area and that's looked at based on whether the school has capacity to take them. As a general rule, if the school does not have capacity, then the school can't take the student unless 'there are exceptional circumstances then that's a conversation that happens between the principal and the director.'* If the school does have capacity to take the student, then a panel is convened *'which includes at least one member of the executive and they look at the reasons that they want to enrol within that school, and one of those reasons might be about the learning needs of the student, which is a valid reason'; 'I can think of lots of primary school examples ... but it's a little bit different for high school.'* The DEL gave a recent example of a student in high school accepted in an out of area school based on the following reasons: *'The parents have work close by and then they need to pick up the student of an afternoon to get them to Occupational Therapy ... so then I think that would be a valid reason to allow them to come into the school.'*

The second part of the vignette sought to understand what reasonable adjustments are provided to the student. This is to ensure that the NSW Department of Education complies with s 22 of the *Disability Discrimination Act 1992* (Cth), and s 49L of the *Anti-Discrimination Act 1977* (NSW), and creates an environment where the wellbeing of the student is considered. Furthermore, the *Disability Standards for Education 2005* (Cth) outline the obligations on educational institutions and seek to ensure that students with a disability can access and participate in education on the same basis as other students.⁷⁵⁶ Principals Beau, Cole and Duke all referred to a lack of funding to support students with learning difficulties, with Principal Beau stating that: *'Funding and frustration of all the NGOs out there — All no help.'* Similarly, Principal Cole stated that *'funding is an issue'*.

⁷⁵⁵ Dual exceptionality (or twice-exceptionality) refers to gifted students who also present with one or more specific learning difficulties; physical, emotional or behavioural disabilities; or other factors that may impair performance and mask high potential:
<https://www.education.act.gov.au/_data/assets/word_doc/0010/1767268/ Twice-Exceptionality.doc>

⁷⁵⁶ Elizabeth Dickson and Joy J Cumming, 'Reasonable Adjustment in Assessment: The Australian Experience' in Karen Trimmer, Roselyn Dixon and Yvonne Findlay (eds), *The Palgrave Handbook of Education Law for Schools* (Palgrave Macmillan, 2018) 315.

The DEL had a series of steps that they undertook when enrolling a student with a learning disability: *‘As a principal, I would oversee it, [but it] would involve talking to the principal or the learning support teacher from the previous [could be primary or secondary] school to get some more background information about the student.’* Secondly, they would *‘consult with the learning support teacher at the school where they are enrolling into to let them know ... the student would come up as part of a learning support team meeting, and for them to be able to disseminate that information to the learning support teachers within the school.’* The DEL took a collaborative approach and stated that *‘obviously talking to the parents and that, they come in and you have a conversation with them around the needs of their student and what year they are enrolling into’*. The DEL further added that you treat this student like all other enrolments and as part of that process the principal just follows *‘all [of the] procedures that you would go through as part of a new enrolment, so orientating them with the school and the student, so assuming that the parent has turned up at the school together, showing them around, introducing the parents to the staff, showing the student where things are, so following that induction process’*. In the DEL’s experience, all of their secondary schools have a year advisor, so as part of this enrolment process, the DEL *‘would be contacting the year advisor and letting them know about the student.’* The DEL further added that due to the complexity of secondary schools, they would be *‘making sure that all the staff are aware because this is a high school and so this child is going to come into contact with lots of teachers ... and making aware that this child has got Asperger’s or learning needs’*.

Principal Beau reflected on the details of a real-life lived experience when enrolling a student with learning difficulties. Firstly, Principal Beau advised that *‘it’s as common as mud’* to have students enrol at the school that have some form of learning difficulty. In providing for this student, Principal Beau outlined the processes: *‘I would have them present at the enrolment interview and I would bring up one of my learning and support teachers.’* Principal Beau identified funding as an issue at the school when catering for students with learning difficulties with the statement: *‘Gonski give me a few more’*.⁷⁵⁷ If the student has come from a government school, Principal Beau *‘would do the normal background checks that you have to do and the counsellor may ring the counsellor to find out how that Asperger’s syndrome behaviour manifests itself’*, to best create an inclusive environment for the student. Principal Beau sought

⁷⁵⁷ Australian Government, Department of Education, Skills and Employment, *Through Growth to Achievement: Report of the Review to Achieve Educational Excellence in Australian Schools* <<https://www.dese.gov.au/quality-schools-package/resources/through-growth-achievement-report-review-achieve-educational-excellence-australian-schools>> (‘Gonski Review’).

to cater for the individual child by seeking detailed information about the child, such as *‘Do they sit there and cry a lot? Do they go off their trolley? Are they violent, or are they just a bit rude and abrupt? There’s all those kinds of things.’* Once Principal Beau had sought some information, they would go through the *‘issues in the interview with [the student and parent(s)/guardian(s)] and her learning support teacher who ask a whole lot of questions about how it manifests, and then they would develop a plan, a plan to integrate them effectively into the classroom’*. Principal Beau developed a welfare/wellbeing meeting that was convened once a week, where *‘the advisor would advise all the teachers’* about this particular student and how best to cater for the individual: *‘we give generalised advice to teachers on how they manage issues’*. Principal Beau delegated the provision of education of special needs students to the learning support teacher and the learning support teacher *‘may email some strategies’* to teachers to cater for the individual child. Finally, Principal Beau outlined their frustration at times when parents were not forthcoming with information about the learning needs of their child: *‘[I]f it was a diagnosis as we found today of autism that the parent had not told us about, then we would even be looking at access requests for an alternative placement, but you have to wait for week four, or week eight placement panels.’* This indicates Principal Beau’s frustration at the system because these matters needed to be dealt with urgently and in the meantime the school was left with the issue and little to no support.

In providing support to a student with learning difficulties, Principal Cole stated that at their school *‘we have a 0.6FTE learning difficulties teacher here, which is nowhere enough, we don’t have many kids with significant learning difficulties, but we do have enough to definitely take up that, we don’t get enough funding or staffing for that’* and they *‘would take the advice of the team’*. In providing for the student, Principal Cole’s approach was to attempt to get *‘all of the documentation that comes with that child ... get as much information from the primary school as possible’*. Furthermore, Principal Cole had a hands-on approach in that they would expect the *‘learning support teacher would go and meet with that child’s teacher [in primary school] and have several meetings with the parents’*. Principal Cole’s approach went beyond the school setting and sought to understand if the child *‘has social behaviour training with a psychologist or someone who works with those kids ... so we would look at all of that’*. Principal Cole would *‘develop a personal learning program that would be available for all teachers’* and apply for relevant funding: *‘if there is special funding, then we would obviously apply for that funding’*. However, Principal Cole commented that *‘we really don’t have the funding to support really high needs kids at this point’*. Principal Cole also believed in capacity building of the teachers,

by ensuring that *'we would make sure that those teachers have training in looking after an Asperger's kid'*. A powerful approach Principal Cole advocated for in providing social justice for all students is captured in their final sentence: *'So you just make sure that everyone that needs to know knows ... we do our best to provide the kind of education that the child's entitled to, which is the same education that everybody else is entitled to.'*

Similarly, Principal Duke attached weight to capacity building of the teachers and provided a relevant example: *'[W]e had an Asperger's kid and a Tourette's kid ... and they came and told the staff what to expect, so we had a bit of pre-training for staff before the student arrived.'* Principal Duke also *'went through quite a few processes about what to expect, what to do about it and how to deal with it ... the kid was easier to manage because the staff were forewarned about what was going to happen and what they were going to do'*. Principal Duke routinely commented about the training of staff within the school when providing for the education for a student with learning difficulties: *'whatever the scenario, that we have good information and training for the staff to deal with it, and support for the kid through the process'* and *'[n]ormally they [students with learning difficulties] come attached with hours of support or used to but that's a bit different now since the National Disability Scheme things have changed a lot. Not necessarily for the better. There's heaps of money floating around and where there's money, there's people that want to take it.'* This added to the complexity for Principal Duke to cater for students with learning difficulties as they were limited by funds. Principal Duke was empathetic to the child's learning needs stating that *'you have to put it in a situation that they're finding life pretty hard, so make some compensation for them. Reasonable adjustments is basically what we do.'* However, Principal Duke was also realistic about managing the expectations of parents: *'but you get parents that want the world and I've got a big file here with a hundred emails in it ... we have been taken to court over it ... nothing was ever going to be enough'*. Principal Duke gave an example of where sometimes *'the parent just wouldn't accept that the kid had a problem, and the school got the blame for everything that followed'*. Principal Duke talked about the emotional toll at times of providing for students with learning difficulties: *'[M]y deputy and I had been EPACed [Employee Performance and Conduct Directorate] over it and there was nothing there ... it was a bit stressful for a while with all of these things going on.'*

5.4.2.2 Summary of Inclusion — Principal Perspective

The research participants (the principals and the DEL) all had strategies for including students with learning difficulties within their school communities consistent with the policies published by the NSW Department of Education, which includes a duty to consult. Furthermore, the principals and the DEL complied with the *Disability Discrimination Act 1992* (Cth)⁷⁵⁸ and the *Anti-Discrimination Act 1977* (NSW)⁷⁵⁹ by creating an environment where the wellbeing of the student is considered. Furthermore, provisions in accordance with the Disability Standards for Education 2005 (Cth) were enacted. However, the principals and the DEL mentioned funding being an issue with respect to the provision of an outstanding education by the NSW Department of Education and with more funding, the principals and the DEL felt that they could better cater for students with learning difficulties.

5.4.2.3 Education Lawyers

Firstly, it is worth mentioning Lawyer Ares, who was interviewed several years ago in 2014 as a pilot to this research and provided some useful statistics with respect to disability cases: *‘[W]e probably get about fifty to a hundred discrimination cases per year, most of those are able to be settled, I mean I would say ninety per cent plus of those are able to be settled by conciliation between the parties, sometimes that requires the school having, obtaining a better understanding than it previously had of the discrimination responsibilities ... so for the discrimination cases, as I say, ninety-five per cent plus I would say are, I mean it’s very rare for us to have to go to a court decision for the settlement of a discrimination case, so if they are following the policy, they are following the law. If they are following the enrolment policy, they should be following the discrimination law.’*

Lawyer Boyd provided some examples of issues concerning a student with a disability that were escalated to the NSW Department of Education Legal Services Directorate. Parents would claim that the school *‘didn’t make a reasonable adjustment for my child, you discriminated based off religion, whatever, things like that, or you didn’t move this child into another class ... that’s discrimination’*. Lawyer Boyd commented that disability discrimination is a complex area: *‘[O]ften, I would say some are legitimate, others are not legitimate ... and more often than not they are more just complaints and they’re trying to say what’s on the basis disability or on the basis of race that you’re not making a decision in my favour. But it’s often not the*

⁷⁵⁸ *Disability Discrimination Act 1992* (Cth) s 22.

⁷⁵⁹ *Anti-Discrimination Act 1977* (NSW) s 49L.

case.’ In relation to disability, Lawyer Boyd was mindful that *‘it has to be a reasonable adjustment ... it might be too costly or too onerous for the school’*. In disability matters, *‘the matters go to the Australian Human Rights Commission which is a non-compensation-based process ... you are going there more to mediate and find an outcome, it is not necessarily about awarding money’*.

Lawyer Ezra similarly presented examples in the educational context and stated that *‘I wouldn’t use the term procedural fairness in that case, I would call it more, it’s about whether good decisions are being made or not.’* The people *‘responsible for admission decisions told parents that they thought it was going to be too difficult for the school to accommodate the particular child’s disability’*. In this case, Lawyer Ezra agreed with the decision of the principal; however, *‘but the way they did it, because they didn’t collect all of the necessary information, first, laid wide-open, vulnerable to litigation, and they lost the litigation’*. This is a clear example where, had the principal been informed of the rules of procedural fairness prior to that decision being made, litigation may have been avoided for the NSW Department of Education. To support this statement, Lawyer Ezra stated: *‘I think that it is possible that if they had made the decision in a different way, it never would have got to litigation.’* In critically examining the outcome of the case against the NSW Department of Education, Lawyer Ezra commented that *‘I think the court was wrong, but the school and the insurer were not prepared to appeal the decision. I think that it was not unlawful discrimination, and I think that situation was created by bad decision making, a failure to collect the right amount of information before making a decision.’* Lawyer Ezra gave a further example of bad decision-making that ended up in the Human Rights Commission in a conciliation *‘because they [the school] didn’t adequately gather information and work out what the real problem was’*, and the importance of updating policies to change with the times: *‘making decisions based on rigid policy that wasn’t right anymore, maybe it was right once upon a time’*.

Lawyer Gabe, when managing enrolment matters around disability discrimination, acknowledged the requirements that require a principal or school to *‘consult, and as part of consulting to consolidate a reasonable adjustment. So as part of consulting about a reasonable adjustment, you’re actually giving the person ... procedural fairness because you are giving them an opportunity to be heard about what they would like for their child and provided with relevant information that’s going to underpin the decision.’* Lawyer Gabe therefore advocated for school principals or delegates to meet with the parents and work out a plan of action for the

individual child and for the parent to contribute to that discussion. This ensures the wellbeing of not only the child but also the broader school community.

5.4.2.4 Summary of Inclusion — Lawyer Perspective

Consensus between the lawyer participants was that if the school principal complied with the relevant policies, procedures and guidelines for enrolment, then the principal was complying with the law. Several of the lawyers commented that it is often the processes undertaken by the school that influenced whether the wellbeing of the student was being addressed. The process of consultation therefore provides affected parties with an opportunity to present their case prior to a decision being made, which is consistent with the principles of procedural fairness, as discussed in Chapter 3.

5.4.3 *Conclusion and Key Findings — Theme 2: Student Wellbeing and Procedural Fairness*

Student wellbeing is one of the fundamental considerations of the NSW Department of Education, as discovered through the semi-structured interviews. In developing and maintaining student wellbeing, the rules of procedural fairness should be applied to students when considering their initial and ongoing enrolment in the school. All principal participants had a sound level of knowledge and understanding of the rules of procedural fairness and provided several examples of when and how the rules of procedural fairness were applied in student discipline matters and for the provision of a student with special needs. Consistent with the above, the lawyers (a combination of both internal lawyers and lawyers external to the NSW Department of Education) similarly commented with respect to the application of the rules of procedural fairness in student discipline and the provision of education for a student with special needs. In summary:

- Student wellbeing is of paramount importance to the NSW Department of Education. This is governed by several policy, procedure and guideline documents which the principal is expected to comply with. In addition, principals are required to develop their own school welfare plan, which is subject to review by the DEL.
- There are 12 references to student wellbeing in the AITSL principal standards, which signals the importance for principals to comprehensively understand the wellbeing of students in the school community.
- The principal participants relied on NSW Department of Education policies to inform their processes and decisions when managing student discipline and special education.

- In providing for some students, the principal participants noted that there was a significant burden on the principal in engaging several stakeholder groups before a student could enrol in the school. This was noted for students who had a violent past, criminal record/s or severe learning disabilities.
- In instances of illegal drugs in school, the principal participants reported this externally to the school such as to the NSW police and or child wellbeing unit and left it to those external agencies to manage.
- When managing student conflict or bad behaviour at school, all three principal participants and the DEL looked at the underlying causes for the student's behaviour before making discipline decisions.
- The NSW Department of Education in-house lawyer participants who referenced the suspension policy in their responses all mentioned that there was no obligation on the school principal to impose a mandatory suspension and that in-school suspensions may be more appropriate, providing they consider the wellbeing and welfare of the school community (eg for violent behaviour).
- For students who presented at the school with special education requirements, all principal participants referred to the policy and if the student was in the catchment area, they were enrolled. The challenge comes when a student who has special education requirements wants to enrol but is outside the catchment area.
- A lack of funding for the provision of education for students with special education was mentioned by the principal and the DEL participants; without funding, the school is unable to provide the services the student requires to be successful in achieving learning outcomes.
- In disability discrimination matters, the process could be streamlined to seek early resolution; however, as mentioned by some of the lawyer participants, no matter what the NSW Department of Education does, it would never be sufficient for their child. The issue remains that while the matter is ongoing, the affected child may not be receiving the level of support required to be successful at school.
- Principals need to understand the rules of procedural fairness when decision-making with respect to students with special education so as to avoid Australian Human Rights Commission complaints and/or litigation.

5.5 THEME 3: INDUSTRIAL RELATIONS AND PROCEDURAL FAIRNESS

Teachers in NSW are governed by the *Teaching Service Act 1980* (NSW) and *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2020*,⁷⁶⁰ which set out their obligations and duties as teachers for the State of New South Wales. The *Teaching Service Act 1980* (NSW) under part 4A Management of Conduct and Performance makes specific reference to the rules of procedural fairness when terminating or disciplining staff. Section 93D(2) states that ‘the procedural guidelines must be consistent with the rules of procedural fairness’ and s 93D(3) states that:

- (a) An officer to whom an allegation of misconduct relates:
 - (i) is advised in writing of the alleged misconduct and that the allegation may lead to disciplinary action being taken with respect to the officer, and
 - (ii) is given an opportunity to respond to the allegation, and
- (b) An officer against whom the Secretary is proposing to take disciplinary action under Division 3 is given a reasonable opportunity to make a submission in relation to that proposed action.

In NSW, the EPAC directorate is responsible for investigating allegations of underperformance of staff and staff misconduct as referred by NSW government secondary school principals. EPAC’s legislative functions on behalf of the NSW Department of Education include:

- investigating allegations of misconduct in accordance with the *Teaching Service Act 1980* (NSW), the *Education (School Administrative and Support Staff) Act 1987* (NSW) and the *Government Sector Employment Act 2013* (NSW); and
- meeting the NSW Department of Education’s obligations under the *Ombudsman Act 1974* (NSW), the *Child Protection (Working with Children) Act 2012* (NSW), the *Independent Commission against Corruption Act 1988* (NSW) and the *Public Interest Disclosures Act 1994* (NSW).

This theme sought to understand the principal’s role in applying the rules of procedural fairness when managing under performance, which is defined as a failure to meet any one of the AITSL standards,⁷⁶¹ and teacher misconduct, which is any breach of the NSW Department of Education

⁷⁶⁰ NSW Government, Department of Education, *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2020* <<https://education.nsw.gov.au/content/dam/main-education/industrial-relations/media/documents/awards/teachers-award/teachers-award-2020.pdf>>.

⁷⁶¹ Australian Institute for Teaching and School Leadership Ltd, ‘Australian Professional Standards for Teachers’ (Web Page) <<http://www.aitsl.edu.au/australian-professional-standards-for-teachers/standards/list>>.

Code of Conduct.⁷⁶² A significant majority of the participants' responses related to the EPAC directorate. In January 2019, Mr Mark Tedeschi, AM QC was commissioned to undertake a review into the functions and operations of EPAC, the final report of which can be located on the NSW Department of Education website.⁷⁶³ This report discussed the application of procedural fairness within EPAC, the directorate responsible for the investigation of employees' performance and conduct, which are beyond the scope of the principal's function at the school. The principal's role with respect to EPAC is to report, and then cooperate with EPAC led investigations. The DEL summarised the principal's role when managing staff under EPAC's guidance as *'quite often what happens is that EPAC will assess the situation and ask the principal to deal with it locally and give advice on how the best way to do that'*. What may end up happening here is that EPAC gives advice and then the process fails when the principal does not follow that advice or manages the situation in an unsatisfactory manner.

5.5.1 Vignettes and Examples

5.5.1.1 Serious Staff Misconduct

The principals, the DEL and EPAC member participants were given a vignette regarding an inappropriate student–teacher relationship where the evidence was based on the student's word against the teacher's. The aim was to ascertain the processes the principals followed at the local school level when managing serious staff misconduct. All the principals and the DEL responded with, *'I just ring EPAC'*. However, the way in which principals undertook this function is worthy of a discussion. The DEL stated that *'you would get advice from EPAC on that one because they are the experts and they know exactly what to do, and they would step you through exactly what to do and even as a director, I'd do that because you get lots of complaints and questions around staff, and it's not just about staff relationships with students ... so it's always just good practice to contact EPAC around that'*. However, the principal is at the frontline in having to manage the situation with advice from EPAC; therefore, how that is executed is essential understanding for the principal. The DEL stated that *'you would want to get a pretty quick reply because obviously you want to get a same day or next day reply from EPAC because you'd want to know what is the next action you're going to take ... it might mean that the*

⁷⁶² NSW Government, Department of Education, 'Code of Conduct Policy', *Policy Library* (Web Page) <<https://policies.education.nsw.gov.au/policy-library/policies/pd-2004-0020>>.

⁷⁶³ Mark Tedeschi AM QC, *Review into the Functions and Operations of the Employee Performance and Conduct Directorate (EPAC) within the New South Wales Department of Education* (Final Report, June 2019) <<https://www.education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/media/documents/EPAC-Report-2019-Final-Secured.pdf>>.

principal needs to get advice from EPAC that the staff member might not come to work the next day until it's been/while it's been investigated especially if there's a risk of harm to students'. The DEL summarised the role of the principal well in that 'so while EPAC may give some guidance and feedback on how to deal with it, it's still the principal that has to deal with the situation' and the principal might not know how if they have not been trained or have experience in these matters.

The EPAC member was given the same vignette and in a response similar to the DEL, the EPAC member stated: *'EPAC has really clear procedures, the principal doesn't have anything to do with that, the biggest requirement for the principal is that within 24 hours they need to notify EPAC and we have procedures called Responding to Allegations Against Employees in the area of child protection, so that would be notified within 24 hours, preferably the same day and would be notified to the police.'* The EPAC member further commented that it would be up to an appointed EPAC investigator to *'liaise with the police to determine whether they're going to take any action or not'*, which demonstrates that the principal has minimal involvement: *'in fact, the principal is not permitted to speak to the teacher about it because more often the police want them to have a heads up because if it's proven, it's a dismissible offence, so the principals main role in this situation would be to notify EPAC and the police'*. The EPAC member went further into the principal's role in relation to the vignette in that *'the principal would largely sit back and let EPAC do their job, but it's also to provide some level of pastoral care, for example, a letter has to be delivered, and that might be a fairly distressing letter saying, "Allegations have been raised about your conduct" or it might not say very much at that point, and we're directing you to alternative duties at the X office under the supervision and you need to report for duty under the same terms and conditions on X date'*.

Other duties for the principal in serious misconduct matters may be *'to deliver that letter and escort the person from the school grounds'*. The EPAC member made specific mention to the skills in which this is performed by the school principal, as these can have significant ramifications as to how the staff member perceives the process as being unfair: *'of course some principals can do that well, or they could do it really badly, it might depend on the reaction of the teacher, but also on the skill of the principal'*. Therefore, it may be fair to say that principals would require some degree of training if they had to perform such a function under the guidance of EPAC. Unfortunately, not one of the principal participants mentioned any training with

respect to managing serious teacher misconduct and how they would navigate the process beyond calling EPAC.

Similarly, Principal Beau outlined the process with respect to the teacher: *'EPAC would be the ones who would advise you what to do with the teacher, and now because it's a sexual case, I suspect they would tell us not to do anything about it because they would send investigators out.'* Principal Beau gave a real-life example from the lived experience in relation to a similar situation: *'I remember the time some porn was found at our school on a teacher's computer as we walked in, they sent people out and they seized the computer ... I imagine they would use similar processes, so I would not go near that teacher ... I wouldn't do a thing until I rang EPAC and they might immediately advise you to, in fact, they would send investigators around, I think immediately because there would be a risk of that teacher immediately to that student, themselves, or others ... so I think I would wait for advice from them, and I'd wait for advice from Incident Notification and Response and I think that issue would be in their hands, that wouldn't be something that they gave me to manage.'* From the above, it is clear that Principal Beau was aware of the vast array of internal support mechanisms for managing serious misconduct by members of staff. Therefore, the application of procedural fairness in the above scenario is not applicable to the school principal, and the school principal's duty is to the wellbeing of the school community.

Principal Cole followed a similar approach in that *'I ring EPAC and I know exactly what EPAC would do, and they would advise on what information that we have'*, even though *'I've never been in that situation, so I don't know exactly'*. However, Principal Cole was aware of the urgency in removing a teacher from the school in such a situation if the wellbeing of a student were in jeopardy: *'this would all happen on the same day that this is brought to my attention and EPAC would make a decision right there and then about is this something where the child is deemed to be unsafe'*. Principal Cole added that *'the teacher is sent to another location for the duration of the investigation'*. Once the student was safe and the teacher removed from the school, Principal Cole then outlined *'that an investigation would follow, but as soon as that is brought to my attention, I would go straight to EPAC, they tell me what to do, which includes there would be a written directive or written something to the teacher, to tell them what their responsibilities are and I would also take their advice on how and what to say to the parents and how and what to say to the child'*. Drawing further on the theme of wellbeing of the school community, Principal Cole was cognisant of the fact that *'these kinds of things get really messy*

and you don't want to mess it up for anyone ... you want to ensure that justice is served for whoever is at fault or whoever the victim is here'.

Principal Duke responded to the vignette in a very personal way having lived through several claims made by students against teachers during their tenure as principal. It is useful to include verbatim Principal Duke's response; however, as with Principals Beau and Cole and the DEL, Principal Duke reported such matters directly to EPAC and was not involved in the decision-making process. Principal Duke's response was as follows:

'We must investigate this matter, but we must also report it immediately. It is a mandatory reporting matter. There is a whole set of guidelines about what to do in these cases. But we must report it. The teacher has a certain amount of rights. But normally what happens is the teacher is taken out of the environment. I know that there have been three cases of teachers that have committed suicide while they have been waiting around for this process, and at least one case was vexatious. And the person kind of died for nothing. But these are tricky things. He said, she said type things, but the presumption is on behalf of the child immediately, and so you just must wear that, and try to be as dignified as possible with the teacher. They have got to get appropriate legal support and counselling as well as the student, but you do not have to make many decisions on this. This is already decided for you. You have got to do this. And any time you stop to think about it, you are going to find yourself in more and more difficulty. So, there is a straight thing. For me you do not mess about with those sorts of things and try to make it better, try to intervene on behalf of the teacher, or the kid, or whatever. You just must follow the bouncing ball and try to make the impact as low as possible on the parties concerned. That is all you can do. But it is a tricky area because some people, girls particularly have done it to young teachers to be vengeful for some reason or other. That has been very hurtful, and I think their career doesn't ever get over that so don't ever be around yourself with a young girl.'

What emerges from this statement is the concern over dealing with vexatious claims and the time it takes to comply with all of the elements of the rules of procedural fairness, which distracts the principal from their other core roles and responsibilities, as outlined in Chapter 2. Principal Duke followed the required NSW Department of Education policies and processes, but they attempted to provide a humanistic approach to managing such a complaint. However, all claims and complaints must be taken seriously and investigated accordingly.

The principal participants and the DEL who took part in this study all commented that EPAC provided appropriate support and guidance when dealing with an inappropriate student–teacher relationship. In serious staff misconduct scenarios, the principals had little involvement in affording a teacher procedural fairness and the elements of procedural fairness were delegated to EPAC as the investigating unit and decision-maker on behalf of the NSW Department of Education.

5.5.2 *Procedural Fairness in Underperformance*

Several of the principal participants gave examples of industrial relations with respect to underperformance where their major concern was for the wellbeing of the students at their school. The DEL noted that *‘[a]nything around performance ... well, not everything, but serious things around performance and conduct, contacting EPAC and getting advice’*. The DEL went further, identifying that principals have little to do with staff performance and conduct once EPAC is notified: *‘EPAC just run that whole process themselves, so it’s almost as if the principal does not really have any determining factor in this decision-making ... once the principal has referred, then EPAC make a decision.’*

Similarly, Principal Beau discussed procedural fairness around teacher underperformance from their lived experience: *‘if you have a teacher who is doing six things wrong such as arriving late to class, not on duty or being rude about their colleagues, you have to do a separate letter of direction for each of them, or it’s not a breach ... but that’s procedural fairness gone mad ... and I have learnt that next time I am going to put everything in the first one, every problem so the second letter kind of hits them again’*. Principal Beau’s approach was to give the person an opportunity to improve; however, from experience, they prepared for a long and agonising process of teacher improvement. This is resonated in Principal Beau’s comment: *‘I have had people who should have been sacked after six months that last eight years.’* Principal Beau further explained that providing the elements of procedural fairness in teacher improvement plans in the *‘New South Wales performance teacher improvement program as it currently exists is considered by human resource managers the most difficult one to complete in the southern hemisphere’*. Therefore, in Principal Beau’s response, due to their lived experience of going through the process of a teacher improvement plan, Principal Beau had an excellent knowledge of the rules of procedural fairness as applied to the school context in industrial relations matters, which had been tested by the NSW Department of Education.

Principal Cole's response was consistent with Principal Beau's around the long, agonizing and frustrating process in managing underperformance of teaching staff. Both Principals Beau and Cole were concerned with the wellbeing of students and having an underperforming member of the teaching staff was of grave concern to them both. Principal Cole gave an example of a situation where they were required to performance manage a member of the teaching staff: *'if there's someone whose performance is under question, you go through a long process of support and without even looking, I notify EPAC straight away'*. In outlining their process, Principal Cole went through the series of steps to be checked off from low level to more serious issues in underperformance. Firstly, Principal Cole *'raises the issue that I am concerned about this teacher, about their performance, we're very low level at this point, but this is what we are doing and EPAC give advice or not, say, "Keep us posted"'*. If the teacher improves at this point, the principal need not take any further action. However, if the teacher does not improve: *'if it moves along to a more serious point, then someone from EPAC will actually come out, and the field officers will guide us through whether we've done all the right things to support the teacher, whether we have provided them with enough support ... and then on the other side of it, do we have enough evidence to proceed to a more formal program, and that formal program is so procedurally fair, it's almost ridiculous'*. In this situation, while the principal is the reporting officer to EPAC, the principal is well supported internally within the NSW Department of Education. Principal Cole advised that a teacher improvement plan is a *'10-week formal support and that she had been providing support for months'*.

As part of the process in applying the rules of procedural fairness around staff underperformance, Principal Cole *'always encourages them to come with a support person, and if they are a member of the union, to bring the Federation representative with them ... if the Federation representative does not come with them as their support person, I will get the Federation to come as my support person because I think the Federation are more familiar with the procedures than anyone else'*. Furthermore, Principal Cole referred to the quality of support provided by the Federation: *'the Federation are really good at making sure that all the procedures are followed and that's in everybody's interest ... so we go through the process, everything has to be documented and then that all goes off to EPAC for review'*. When dealing with industrial relations matters concerning teaching staff, Principal Cole also had a sound understanding of the rules of procedural fairness when dealing with underperforming staff. Principal Cole summarised their knowledge as *'I think I'm pretty clear on the procedures.'* One

final comment that Principal Cole makes is that they are well supported in the role of the principal: *'I know I just go to EPAC to ask for "What do I do here?" and they're very helpful.'*

Principal Duke's response corresponded to that of Principals Beau and Cole around industrial matters concerning teacher underperformance. Principal Duke focused on the bigger issues that may occur at the school in that when a serious teacher underperformance matter is present, Principal Duke *'follows the bouncing ball because it's pointless to deliberately provoke an industrial issue when there is no need to do so ... we keep our fights for the things that really matter'*. Therefore, Principal Duke attempted to first resolve issues at the local level prior to them escalating, particularly around teacher underperformance. Principal Duke discussed this approach with a whole-of-department approach: *'my view is that you have to deal with your own problems, and you have to confront them at the time. You wouldn't want someone else to get this person, not knowing anything about them so you have to deal with it yourself'*. Principal Duke went further and commented on the NSW Department of Education: *'I think as a profession we haven't been great in relation to this and because we're a system, there's a tendency to absorb things rather than to expose them ... I take a keen interest in making sure the processes are correct in relation to that.'* Principal Duke also discussed how many principals were not willing to go through this challenging process and hence undertake alternative avenues to remove the teacher from their school; however, this would just compound the problem for another principal: *'the fact that they make it procedurally so difficult is also the reason there's still so many incompetent teachers around because people won't do this ... principals will try and get rid of them by some sort of administrative means or alternative way'*.

Principal Duke commented on the challenging time frame to complete such a teacher improvement plan: *'they said it would take ten weeks but then the process doesn't take ten weeks because you've got to go through a whole bunch of processes before the ten weeks ... it used to be that you had a pre-improvement program that went for four to five weeks, and then you could put them on a program if they didn't improve ... now you don't have a pre-improvement program, but you can't just put them on the program unless you've tried a list these things first ... so really it is a pre-improvement program ... and it's still tied-up in red tape, and so people are reluctant to embark on it because it takes so much time and effort.'* Therefore, just the process alone is a challenging task for the principal and the school community, while student wellbeing is being affected and learning goals are failing to be met due to the incompetent teacher.

Principal Duke provided an overview of complying with procedural fairness in industrial matters: *'every time the Department of Education puts out a policy they say, these are the rules of procedural fairness around this. These are the basic rights that these people have got, and you don't do things unless you abide by those, because if you miss a step, particularly in relation to industrial matters, you can come to grief'*. Therefore, Principal Duke was aware of the elements of procedural fairness and the requirements to follow the relevant policies, guidelines and procedures. Similarly, Principal Duke provided a real-life account of a teacher improvement program: *'one example here is I have had a person who had both a performance issue and they also had a code of conduct type of issue and they were affecting each other to a great degree ... and so I tried to put the person on a program and the union was insistent upon these things being separated ... they would deal with one or the other but not both of them ... to the extent if something was a disciplinary matter, they would deal with it'*. This goes some way to show the complex role of the principal in dealing with the initial stages of teacher performance and industrial relations. Finally, Principal Duke gave an example that clearly articulates the agonizing process that the principal, deputy principal, head teacher and school community go through when placing a teacher on an improvement plan: *'I've had three situations where people have been removed from the school because of being unable to be effective teachers. You have to be willing to go through the entire agonising process, which is reams and reams of paper, every single 'I' dotted, and 'T' crossed to make the whole thing work, and even then, at the end, you may not be successful.'*

Principal Duke further discussed the emotional, mental and physical toll on both the school executive and teaching staff members, reflecting on this process: *'the two head teachers who I did it with, they said to me at the end, "I don't think I'd do that again", they got through the process, but they were like, "Don't ask me to do this again" because in the end the staff members who know that someone's incompetent, basically, it's such a harrowing and awful process for this person, that in the end, they side with the person against the management because it seems so cruel that ultimately they are still there suffering day in and day out'*. Of concern was the animosity that existed in the relevant departments while the teacher improvement progress was ongoing: *'the head teachers felt that it hasn't been good for their faculty'*. And while Principal Duke had to undertake the teacher improvement program, which ultimately led to the termination of that staff member, Principal Duke summarised the cost to the school community as *'it had to be done, but the opportunity cost of it was pretty high in terms of what happened'*. The EPAC processes may now go some way to remove the principal

from resolving teacher underperformance at the school level, as this is undertaken by an external directorate from the school; however, one that is still within the NSW Department of Education.

5.5.3 *School Principals Complying with Procedural Fairness in Industrial Relations from the Perspective of Internal and External Lawyers*

As previously discussed, but must be restated, teacher conduct and performance matters are handled by EPAC; however, initially the principal has the role of reporting that conduct and performing several administrative duties through that process while being supported by EPAC and the DEL. It is beyond the powers of NSW Department of Education principals to terminate teacher employment contracts. What is worthy of a discussion in relation to industrial relations, procedural fairness and principals, is the role which principals take in those initial stages prior to the issue being handled by another internal agency such as the legal directorate or EPAC. What must also be made clear, is that procedural fairness from a holistic NSW Department of Education approach is beyond the scope of this thesis, and for a comprehensive discussion of how EPAC apply the rules of procedural fairness in staff misconduct and performance matters, refer to the Tedeschi review.⁷⁶⁴ Many of the lawyer participants spoke about the holistic nature of the NSW Department of Education in industrial relations, and while this is of significance, again it is beyond the scope of this thesis. The commentary of the lawyers in relation to the duties of principals is discussed below.

Lawyer Boyd provided a comprehensive discussion around teacher improvement plans that ultimately result in termination: *‘I’ve dealt with several unfair dismissal cases where the teacher has been on a teacher improvement program so they are not up to standard ... they are not meeting the teaching standards and they go onto this improvement program as recommended by the principal ... it’s a very detailed procedure so they have to have meetings over 10 weeks, a meeting every week and part of that process is some of their lessons are reviewed and feedback is provided, and they are meant to then try and improve over that time.’* This demonstrates that at those initial stages, the principal has a pivotal role in performance managing teachers to meet the AITSL⁷⁶⁵ teacher standards. It is of course subjective as to

⁷⁶⁴ Mark Tedeschi AM QC, *Review into the Functions and Operations of the Employee Performance and Conduct Directorate (EPAC) within the New South Wales Department of Education* (Final Report, June 2019) <<https://www.education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/media/documents/EPAC-Report-2019-Final-Secured.pdf>>.

⁷⁶⁵ Australian Institute for Teaching and School Leadership Ltd, ‘Australian Professional Standards for Teachers’ (Web Page) <<http://www.aitsl.edu.au/australian-professional-standards-for-teachers/standards/list>>.

whether someone would deem a person to be meeting those standards; therefore, as part of this initial process, an external person to the school but still within the Department of Education (such as the DEL, an inspector, an investigator or EPAC) make the determining factor that a teacher is to go on an improvement plan.

Lawyer Boyd further added that where the element of procedural fairness occurs is *'at the beginning of the process, the procedural fairness elements are identified, that is, these things you as the teacher are not meeting ... if you don't meet these things by the end then we have to look at different options ... dismissal is the worst outcome ... it's not always dismissal, and there are even informal processes before you get to that ... so setting out exactly what it is they have to achieve, providing the teacher with a bit of support and review meetings so they have an opportunity to discuss things ... and the first part is where they just have their lessons reviewed'*. Therefore, as described by Lawyer Boyd, those initial steps of discussing a teacher's performance, which maybe a highly emotive meeting, are essential for the principal to provide an opportunity for the teacher to be heard and thus comply with the hearing rule under the rules of procedural fairness, as discussed in Chapter 3.

Similarly, and of interest beyond the school principal, Lawyer Boyd discussed the process once it was determined that the lessons were going to be assessed and it becomes the responsibility of an external third party such as EPAC to determine the fate of the teacher: *'a decision is made about whether they'll go further and whether they'll be assessed ... then once they're actually assessed, then that's looking at well is this going to lead to unfair dismissal, and then after all of that, then the principal makes a recommendation to EPAC about whether the teacher has failed to meet the requirements of their role'*. The process discussed by Lawyer Boyd is beyond the scope of this thesis and discussion because the principal no longer has any role to play beyond possibly handing letters to the teacher or escorting the teacher from the school premises.

Lawyer Dion reflected on their role in dealing with industrial relations matters and on what principals did well and what they could improve on in those initial stages of managing underperforming teachers: *'I've done a fair bit of work on that pointy end for the NSW Department of Education in employment, be it either at termination or even just management of discipline and grievances ... in addition to that legislation the policies that the department requires principals and executives to have a really good handle and grasp ... and I think that's where a lot of the procedural fairness issues that if an aggrieved teacher or an affected teacher*

is going to raise issues generally, they start at that point there, and it's either industrial or it's a work health and safety issue, or it's stemming from a discipline issue.'

Lawyer Ezra had one key concept with respect to procedural fairness and school principals in industrial relation matters: *'I want principals to have an understanding of what are the things that make something procedurally fair, and how might they play out in different circumstances.'* Lawyer Ezra's view was that principals understood the concept of procedural fairness holistically and how procedural fairness might apply in the myriad of different industrial relations matters involved at the initial stages when performance managing teaching staff.

Lawyer Finn similarly understood the frustration on the time and the steps that principals have to follow in terms of complying with procedural fairness to even put someone on a teacher improvement plan: *'in the calls that I get, perhaps that would be where principals get frustration of the steps they have to go through with staff'*. The time-consuming nature of undertaking such tasks detracts from quality learning experiences at the school for students and takes the principal away from the key duties in managing the school community. Possibly the process should be much shorter; however, it should still comply with the rules of procedural fairness because every day that underperforming teachers are teaching students, student wellbeing and learning is being impacted.

Lawyer Gabe gave a good example of how the NSW Department of Education breached procedural fairness several years earlier: *'there was a case many years ago, and I think we do this much better now in the department ... it was in the area of employment law and policy, and making a decision that someone would no longer be employed in our organisation without giving them an opportunity to be heard about that decision, even though the merits might have been valid ... that was a breach of procedural fairness'*. Paradoxically, Lawyer Gabe discussed from the lens of relieving head teacher, deputy principal and principal positions within the school: *'in the context of an employer, the principal should not influence in the context of employment ... so in those things, you need to be procedurally fair in decisions about opportunities that might arise, and in discharging that say the expression of interest process is a way of meeting that process'*. Therefore, while this is not a performance management issue, the principal must still follow the rules of procedural fairness in allowing staff with the appropriate skill set to submit an expression of interest for that relieving position.

The lawyer participants discussed the role of the NSW government secondary school principal in industrial relation matters. It was found that industrial relation matters are handled by EPAC and the legal directorate meaning that the principal had a minor part to play in industrial relation matters. Commentary was also made that the NSW Department of Education apply the rules of procedural fairness well, which contrasts with the findings of the Tedeschi review of EPAC.⁷⁶⁶

What follows are two case studies (September 2019) provided by the Barrister and Lawyer Dion: one is for the NSW Department of Education (Case Study II) and one is against the NSW Department of Education (Case Study I). The case studies provide a real-time snapshot of what was occurring in the NSW Department of Education at that time as many industrial relations matters are settled prior to hearing and even when they do proceed to hearing, they are often unreported.

5.5.4 Case Study Example I — Barrister in Education Law

The Barrister described a real-life example of where procedural fairness was not afforded to a teacher by the principal of the school and ultimately by the NSW Department of Education in relation to the teacher's performance in teaching a behaviourally challenging class. A summary of that unreported Industrial Relations Commission case is provided below from the Barrister's perspective in representing the teacher.

'I had a teacher who came along that struck me as fundamentally well-meaning, she seemed extremely passionate about her job. She was working in the public system, for whatever reason she was assigned a class which had several students with all sorts of issues, learning difficulties, autism, behavioural issues, a very difficult cohort. I mean, she is smart, she had an education degree, she had a master's qualification, but it was clear that she was struggling with this particular cohort.

Now, historically she had some good teaching reviews, her former principal spoke very highly of her, and that is how she got this job in the first place. A series of casual teaching positions became more permanent, some great references and then she was thrown into this difficult classroom and it all started to go a bit pear-shaped. She had said to the principal, "Look, I've got a number of students with various disabilities, learning difficulties. Can I skill up a bit

⁷⁶⁶ Mark Tedeschi AM QC, *Review into the Functions and Operations of the Employee Performance and Conduct Directorate (EPAC) within the New South Wales Department of Education* (Final Report, June 2019) <<https://www.education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/media/documents/EPAC-Report-2019-Final-Secured.pdf>>.

more?" She wanted to attend a few conferences, do a course relating to disability. Those requests were denied, she asked for further resources for the purposes of teaching, those requests in the main, were denied. And so, on the one hand she was yearning for greater education, wanting to skill up but on the other, those requests were not really being met.

As time went on the situation became worse, the principal and her developed a personality clash, the principal was of the view that she was, I guess defiant and disobedient. Her position was that she had a very difficult cohort and they needed greater attention and greater resources and it was clear that they were never going to meet eye to eye. So, she was placed on a teacher improvement program, that was one of those examples where one of her former principals actually acted as her support person in relation to that process, and has actually worked as a consultant to the Department of Education, was quite well regarded and his view was that was a bit of a stitch-up. He thought she was being unduly victimized in all of this and really went to bat for her, acting as her support person, even though he had retired, and was still doing some consultancy work.

She would go to meetings with the principal, and again the first ... Often in these processes you hear a bit about a carrot-and-stick approach, or you overwhelm the teacher with a bit of love first, you're doing this well, you're doing this well, you're doing that well, and here are the areas for improvement. But her feedback was, "You haven't done this, you haven't done that and nothing's going very well at all", which just left her completely defeated, ultimately, she failed that teacher improvement program, which did not really come as a surprise to her support person, and indeed me, once I'd read the meeting minutes. And then she came to me because they were proposing to remove her and she got the usual letter from EPAC saying, "That's the end", kind of thing, "What do you want to say in response?"

And what was interesting about that was, it seemed to me that the department had set her up to fail, if she wanted to teach those students today, according to the NSW Department of Education's own website, she would need to have specific master's qualifications. A Master of Education in disability, or an equivalent qualification and this is all laid out on the website and two years' experience in that area. Now by the NSW Department of Education's own criteria she fell short, and yet she was thrown into this, and then adverse assessments were made of her ability. That was a real problem, I think from the outset, ultimately we ended up in the Industrial Relations Commission, because we appealed that she was terminated, we claimed unfair dismissal and we basically went before a commissioner and the thing settled and she was able

to stay, and I can't go into the particulars; however, I think implicit in all of that was I think an unfairness, and that unfairness I think, was recognized in the Industrial Relations Commission by the commissioner who basically sent the parties away and encouraged them to mediate the dispute. Furthermore, the commissioner expressed his concerns, he said of course there's two sides of a story, but expressed some concerns the way in which she had been treated. And one couldn't help but feel, and of course I would say this as her barrister, that she'd been railroaded a bit and I think it was quite a sad case as I say, because I just thought there wasn't a lot of fairness in it from the start. So that's just one that went through the whole process, started with internal, went to EPAC, ended up at, I guess the last stop in the form of the Industrial Relations Commission and then ultimately settled.'

In the above case example, it was demonstrated that in developing and placing a teacher on a teacher improvement plan, as part of that process the teacher is to be afforded procedural fairness as grave consequences such as dismissal can occur. In the Barrister's example, it was commented that the principal needs to understand the elements of procedural fairness so that teacher improvement plans are developed and executed in a procedurally fair way. As can be seen by the actions of the Industrial Relations Commissioner, the parties were required to mediate an appropriate outcome. One inference that can be drawn from the Barrister's example is that a significant amount of time and resources were required to embark on such a process, which ultimately distracted all parties from their core function of student wellbeing.

5.5.5 Case Study Example II — Lawyer Dion in Private Practice Managing a Case on behalf of the NSW Department of Education

Lawyer Dion provided an example of where a teacher was found to be in breach of several policies, guidelines and procedures in relation to their appointment as an assistant principal. The case study provides an interesting discussion about the role of the principal acting as the support person for teaching staff, and hence was seen not to be an objective person. What is interesting here is that the principal made a valid point about being the teachers' supervisor and wanting to provide support for those teachers through the EPAC process. Lawyer Dion's commentary in relation to the recent unreported NSW Department of Education EPAC process is detailed below.

'We just finished a two-week hearing for the department in relation to a decision to demote an AP ['assistant principal'] to a teacher position for a breach of the code of conduct. And in that case, a lot drives or arises from the concepts of procedural fairness and the way she's trying to

argue her case and the alleged failings of both the EPAC and of the school and the principal in that case.

That case is a really interesting one because the principal who raised the issue to EPAC for investigation had come into the role sort of three or four weeks earlier. So she was brand new. And looking at the principals, there was an acting principal for a 12-month period, 9-month period prior to that, and then there was the substantive principal who was in the school at the time this AP was engaged as an AP in the school. It was a special unit, special needs unit attached to one of the schools. Now this is high school as well, so not just public. It was a high school.

In that case the initial principal probably let the, in my view, the AP go of it in terms of what she was able to do and didn't have a strong rein and probably trusted her to be able to do her job. The allegations in this case were two breaches of the code of conduct in respect of inappropriate conduct towards students and not following processes and procedures but underlying all that the case really bubbled around the concept of whether or not she was good at her job and she tried to say, "It's not because of the code of conduct and my alleged breaches there", of which she admits some, denies others. "It's because you don't like me and there's a conspiracy."

The AP that was ... So, the assistant acting Principal during the period leading up to the new Principal coming in really was out of his depth and he admits that he was out of his depth managing her. She was a huge time, resource, and drain on him. He was an AP and was acting up into that principal role and on his own admissions when we spoke to him, he struggled to deal with managing her and therefore things, again, weren't managed properly.

The final principal that came in who is now still the principal in that school saw very quickly that there were issues. What's interesting about what she did was that she asked all of the staff in that unit to write statements and she sat in as the support person during the EPAC interview of all of those staff members and submitted her own statement. I personally think that that was just, she was too close. Now, she says when we raised that with her, "Look, it was my job to be there to support the staff. They're reporting to me conduct and so me being there with them, I'm purely their support person." That was raised as an issue in the case, in defending the case. The applicant said that that was a misuse of or a procedural fairness flaw and that she shouldn't have been doing that and that it was engineered by this new principal.

At the end of the day what arises or falls out of that, not a lot because EPAC were able to determine that there was certain conduct that irrespective of whether or not that principal had managed it correctly was, you know, able to be substantiated and that was sufficient to form the view that she should be demoted.

But speaking to that principal when we worked with her on her evidence, she sort of said, "Look, I can see in hindsight probably I get why", even in the lead up to giving evidence and we make very clear that our witnesses shouldn't be talking to anyone. She was very ... It was a highly volatile situation. She had a number of staff members who were very, quite distressed around this matter and the personal nature of the issues and so she sort of said, "I want to be involved. I want to sit in with them. I want to be their support person", and we sort of had to say, "Look, you are a witness. They're witnesses. What you will do is you will undermine the credibility of all of you if you do that. You need to let us manage it and they need to find other support people. We can keep you in the loop and let you know when we're going to contact them so that you can make sure that there's assistance there for that staff member, but you can't sit in on the process. You've got to step back."

So that was a learning that that Principal developed as a result of this case. It hadn't occurred to her that that would be essentially a procedural flaw. What she saw was, "This is my role to be assisting and to help my staff through a fairly stressful situation." But it's a disciplinary action case and she's disputing that disciplinary action. She wants to be reinstated to the AP role, not in that school. In a different school.

In the above case, while the NSW Department of Education externally ran the matter, the principal sitting in as a support person for the teaching staff was viewed as problematic as the principal was a witness in the investigation. This ultimately affected the credibility of the procedural fairness afforded to the assistant principal under investigation. A lesson learnt from this case is that it is important to have an impartial support person who is not involved in the matter under investigation. As a principal is the supervisor of all staff at the school, including the assistant principal under investigation, the principal is too close. This was consistent with other participants in the study, who found that a support person from the same school often provided challenges in being an objective and independent support person.

These two case studies demonstrate that at the outset, the principal needs to have some knowledge of the rules of procedural fairness, even when most of the duties fall to EPAC.

Lawyer Ezra summed this up as ‘*what I want is for principals is to have an understanding, as a principal, of what are the things that make something procedurally fair, and how might they play out in different circumstances?*’ This therefore links back to the requirement for principals to have some level of training in the rules of procedural fairness, which would be most appropriately targeted at aspiring principals, that is, those who are at the assistant principal, head of department and deputy principal stages of their careers. When they are subsequently promoted into the position of principal, they will have had adequate training and professional exposure in applying the rules of procedural fairness so situations such as those above may not escalate to the point where external adjudication is required.

5.5.6 Conclusion and Key Findings — Theme 3: Industrial Relations and Procedural Fairness

The key findings include:

- When dealing with serious breaches of the NSW Department of Education Code of Conduct, principals immediately refer the breach to an internal directorate, the Employee Performance and Conduct Directorate.⁷⁶⁷ In cases of underperformance in breach of the AITSL teacher standards,⁷⁶⁸ the principal is guided through the process by EPAC. In affording procedural fairness throughout the process in a teacher improvement plan, the principal participants were aware that the wellbeing of the students was affected by underperforming teachers. This was of major concern to all principal participants, particularly with the amount of time they had to provide to the underperforming teacher to meet the benchmark standards.
- The principal participants found the teacher improvement plan process for underperforming teachers to be challenging, time consuming and emotionally, physically and financially draining for all parties involved. While all three principal participants outlined the positive role of EPAC and the support it provided, they felt that underperformance had a significant toll within their school community. Finally, the principal participants commented that they had to be willing to go through the agonising process, which often had significant consequences for their school community and not just for the teacher involved.

⁷⁶⁷ NWS Government, Department of Education, *About Professional and Ethical Standards* (Web Page) <<https://education.nsw.gov.au/about-us/rights-and-accountability/departement-of-education-code-of-conduct/welcome-to-employee-performance-and-conduct--epac-/about-epac>>.

⁷⁶⁸ Australian Institute for Teaching and School Leadership Ltd, ‘Australian Professional Standards for Teachers’ (Web Page) <<http://www.aitsl.edu.au/australian-professional-standards-for-teachers/standards/list>>.

- The lawyer participants similarly discussed EPAC's significant role in affording procedural fairness in industrial relation matters and that the principal had little decision-making involvement beyond that of the initial stages and providing support to the affected teacher.
- Two recent case studies, one for and one against the NSW Department of Education in affording procedural fairness in industrial relation matters, were discussed.
- A recommendation for further research would be to investigate holistically how the NSW Department of Education applies procedural fairness. The first phase of this research has been conducted by the Tedeschi review of EPAC.⁷⁶⁹

5.6 THEME 4: LEGAL TRAINING IN PROCEDURAL FAIRNESS

Principals in NSW government secondary schools perform administrative law decisions on a regular if not daily basis. These can range from menial tasks such as placing a student on detention for failing to follow school rules, to more serious matters such as long suspensions and school exclusion. How school principals accumulate their legal knowledge in the rules of procedural fairness is unknown as there are no formal courses or programs that school principals must undertake prior to being appointed to the principalship. This theme, as generated from the interview data, seeks to understand how school principals develop their legal knowledge in relation to the rules of procedural fairness and makes some recommendations as to how the NSW Department of Education can enhance the procedural fairness knowledge of its school-based decision-makers through appropriate training. Pre-principalship programs addressing preventative legal risk management strategies, and an awareness of the law have previously been lacking,⁷⁷⁰ and the current climate has not changed. To manage the legal matters that arise during the school day, principals and the school executive (head teacher/head of department/assistant principal and deputy principals) need some knowledge of the law.⁷⁷¹ Whilst principals and the school executive do not require law degrees, they do need sufficient legal knowledge to be able to recognise and manage situations that have the potential for litigation.⁷⁷² They also need an understanding of the application of legislation, as there are

⁷⁶⁹ Mark Tedeschi AM QC, *Review into the Functions and Operations of the Employee Performance and Conduct Directorate (EPAC) within the New South Wales Department of Education* (Final Report, June 2019) <<https://www.education.nsw.gov.au/content/dam/main-education/about-us/strategies-and-reports/media/documents/EPAC-Report-2019-Final-Secured.pdf>>.

⁷⁷⁰ Andrew Knott and Douglas Stewart, 'Schools and the Law' (2004) *Edcare News* 17.

⁷⁷¹ Kelley R Taylor, 'Yesterday's Principal, Today's Legal Eagle' (2001) 1(6) *Principal Leadership* 75.

⁷⁷² Douglas Stewart, 'The Place of Law in the Leadership and Management of Schools' (2005) 17(4) *Education and the Law* 127.

numerous statutory provisions that principals must take into account when decision-making.⁷⁷³ According to the literature, many school principals have a lack of understanding when dealing with issues in line with the rules of procedural fairness.⁷⁷⁴

5.6.1 *Principal Participants*

As part of the semi-structured interview process, principals were asked what legal training they had experienced both formally and informally throughout their career. Currently, the NSW Department of Education does not require principals to complete a certification program; however, through the interviews with the NSW Department of Education lawyers, it was found that there is a program called Credential, of which there are eight 15-minute online modules in legal training for school principals. One of the NSW Department of Education lawyers was interested in how effective this training was and the uptake of that training by school principals; however, this was beyond the scope of this research. The NSW government secondary school principal participants were all experienced principals and had been principals prior to the Credential program being rolled out by the NSW Department of Education.

5.6.2 *Training Through Lived Experience*

Generally, the career progression to become a NSW government secondary school principal is through a series of promotions from classroom teacher to head of department/head teacher, deputy principal and finally principal. The DEL discussed the journey in understanding the law for a school principal through their lived experience in the education sector: *‘they gain it from their own experience, so with their own personal professional reading and their own experience in working through the complexities of their own school’*. The DEL values the lived experience of being at the frontline in making legal decisions and it is the experience of being in those situations in which decision-makers learn best: *‘But a lot of it is on the ground, in the field, practical experience ... Learning from your own experience, which in a way is good in the sense that it is good to learn but that it also can be challenging for principals who sometimes don’t necessarily get it right, or may not do it the best way and then so they have to learn from their mistakes.’* The DEL summed this up well in that the learning should take two approaches to reduce mistakes. Firstly, the decision-maker needs to have practical experience and a mentor in the early stages of decision-making; and secondly, some training ought to occur simultaneously

⁷⁷³ Ibid.

⁷⁷⁴ Andrew Knott and Douglas Stewart, ‘Schools and the Law’ (2004) *Edcare News* 17; Ralph Mawdsley and Joy Cumming, ‘The Origins and Development of Education Law as a Separate Field of Law in the United States and Australia’ (2008) 13(2) *Australian and New Zealand Journal of Law and Education* 7.

with the experience to reduce the number of errors made by school principals. Similarly, Principal Beau discussed learning through the lived experience: *‘in the case of a major incident, I would have a discussion with my director ... in the case of HR, there are HR advisors I could consult, and if we’re really stuck, we can ring legal as well ... so it just makes sense that there is a really good system of support and it does work ... I wouldn’t want to work anywhere else where I was winging it ... that would be nerve wracking’*.

Lawyer Finn discussed the aim of training school principals through the lived experience: *‘I guess the hope is once they’ve had that problem once, they get the answer, hopefully then when another situation arises that’s very similar, they don’t need to make that phone call to legal again, they know where to find the information ... my idea when I talk to principals is to give them as much information and context as long as they have time to listen to me to give them ... ideally send an email with some resources ... so that they can find that email again, and all of that useful information ... they don’t have to start at the portal and go, “Where do I find stuff?” Upskilling is my objective.’* Lawyer Finn was able to give a real-life example of when training a school principal using the above principles: *‘a principal rings back six months later with the same question and they change the facts and the legal officer gives a different answer and the principal states, “I don’t think that was the answer that I got last time”. You expect the same answer? Change the facts and I’ll change the answer’*. So, in some instances the real-life lived experience does not always work for Lawyer Finn; however, they do attempt to *‘give them the tools and teach principals in those duty calls’*.

5.6.3 Deputy Principal Training in Procedural Fairness

Legal training was a key issue that came out at the deputy principal level for the principal and lawyer participants. Lawyer Ares commented that *‘you get people that are acting principals, like deputies who are acting or relieving as a principal, perhaps for a term or more, or new principals who are new to the job and have got to learn a whole lot of stuff across many different domains, and I think it’s more difficult for them to be learning on the job across so many domains and it would be good to see that they had reached a standard of understanding and had a pathway to reach that kind of understanding before they were in that role and that principals in that role should be expected to almost as part of the educational leadership role, be aware of legal responsibilities and how they implement them in a practical sense within a setting that the systems and procedures and policies and so on that they have at a school level to see that they are meeting the responsibilities’*. Lawyer Ares commented further that if legal

knowledge were a standard then opportunities for principals and aspiring principals could establish the requisite knowledge and understanding of the law. Lawyer Boyd commented that *‘aspiring principals or before they become principals, they do this program ... I think it’s called Credential and it has a whole bunch of different topics ... one of the modules is legal and it covers a couple of things ... as part of this process principals would be encouraged to read legal issues bulletins because that covers a lot of their legal issues’*.

Furthermore, Lawyer Boyd provided an update with respect to pre-principal legal training: *‘legal services have also created a suite of online learning tools and resources, online learning modules’*; however, Lawyer Boyd was not sure of the uptake of those learning resources as the completion of the Credential program is not a requirement to become a principal or deputy principal in the NSW Department of Education. Lawyer Gabe similarly commented on the degree of professional development rather than legal training at the deputy principal level: *‘I think it would be helpful to look at professional development for not only principals, but for aspiring principals, the ones who are the relieving principal when the principal is away.’* Lawyer Gabe drew on real-life examples of when this becomes important to the functionality of the NSW Department of Education: *‘we usually get a call when the boss is out of the school and X has happened from the assistant principal or deputy principal or heaven help us a classroom teacher, and so hitting that at the assistant principal level, because of course discharging obligations to procedural fairness is in the interest of the student ... we want to value and care for our students, we need to give them a fair go, that’s fundamentally what procedural fairness is’*.

Similarly, Lawyer Cain commented that *‘legal training is required for senior management, so principals, deputy principals, the year coordinators and the school counsellors’*. Lawyer Cain is forward thinking in capacity building junior leaders and preparing them for the role of a school principal at the head of department/head teacher level. Lawyer Dion also commented that *‘the legal sessions that really assist assistant principals, school executives and the principals to understand and think about these issues outside of their everyday working environment,’* adding that *‘there should be an absolute dedicated forum, particularly for executive staff around management of legal issues for head teachers and others’*. This further confirms the importance of legal training at the deputy principal or head teacher/assistant principal level.

The DEL explained that *‘Deputy principals would benefit from training because they are the ones that are dealing with this a lot, so it’s training for teams so training for leadership teams, not just the principal.’* Similarly, when referring to deputy principal training, the EPAC members stated: *‘I would say that internal training would be beneficial for deputy principals. They are often the people who are at the school, the principals are often out at meetings, etc, and the deputies deal with a lot of the staffing and complaints issues. And sometimes, it’s a deputy principal who is relieving for the day that we’re working with.’* Principal Beau stated that *‘you do learn off people who are senior, you learn from the policies already in place and from the handbook’*, referring to when teachers are classroom teachers and they are learning internally from the head of department, deputy principal/s and principal. Therefore, in preparing the principals of the future, the NSW Department of Education could consider training deputy principals in procedural fairness to provide them with experience prior to taking up the principalship and becoming the final decision-maker at the school level.

In the interview with Principal Cole, an opportunity arose for the interviewer to ask, *‘Pre that experience [referring to their experience as a deputy principal in an all-boys school] if some training in procedural fairness pre the deputy principalship would that of been helpful?’* Principal Cole’s response was *‘no, [it] would not have been ... we’re trained in all of that, but until you’re actually in it, and as I said, the procedures are all there, so yes, I guess it’s good, I mean I had a three day how to be a principal thing ... so we had all of that sort of training, but until you use it or until your involved in it really, it’s like any kind of learning, it does not really stick in until you’re in it’.* This therefore adds to the complexity of when in a principal’s career is procedural fairness training best situated. From the data analysed in the training theme, it appears that procedural fairness training is best situated at the deputy principal level prior to taking up the deputy principalship position, for example heads of department (assistant principals in primary schools) who have been identified for promotion to deputy principal within the next 12 months. Therefore, there would need to be some collaboration with HR to identify suitable applicants.

5.6.4 *In-house NSW Department of Education Legal Training*

Participants were asked where they got their legal training/knowledge from to inform their decisions. The DEL stated that *‘principals gain their knowledge through EPAC [and] EPAC are very proactive in being able to give individual advice. EPAC frequently come along to network meetings and give advice and professional learning’.* The EPAC member advised that

their directorate provides *'very clear procedures, and there is a lot of training around that, everything is online. There are also mechanisms where we go out and do training on having the difficult conversation, complaints handling, etc. Some principals are absolutely amazing, others are not.'* When specifically asked about principal legal training in relation to industrial relations (staffing matters), the EPAC member responded that *'they get handheld advice about how to do it. And if it's a really significant matter, sometimes the Director will go out to the school and deliver the letter with them, but they have access to other bodies ... An investigator generally gets allocated very quickly and they basically tell them what to say, how to say it, what to do, etc.'* The EPAC member further added that principals do not do this very often, so the reality is that the training becomes *'just-in-time training'* and that *'the principal has someone from the EPAC directorate talking the principal through what is required'*. Similarly, of importance to EPAC is the need for employment matters to be done well; however, *'if the principal only does this once in a blue moon, they are not going to be wildly skilled at it'*. This further adds to the need for training if a principal does have to undertake the difficult task of removing a teacher from a school on matters of a serious nature.

The DEL, who had previously been a principal, discussed how a significant amount of learning in the field of education law and policy occurs through network meetings, *'that type of professional learning happens at a network level, so from network meetings'*, when principals from surrounding schools within the same directorate meet to discuss matters with their DEL.

Principal Beau found that they wanted to seek further information from the NSW Department of Education Legal Services Directorate: *'I wanted more, particularly in a number of areas, and the department's been outstanding, and has often been outstanding in providing superb professional learning in the key areas of pain, student management, staff performance and conduct, finance, HR processes, student wellbeing, duty of care.'* Principal Beau has been very proactive in upskilling not only themselves but also those within the school around key areas that involve procedural fairness. However, Principal Beau commented that *'it did work better, I think when the department was still focused on delivering professional learning more, today, it's more, give us money and you will go and do it yourself'*. In Principal Beau's response with respect to internal training, they see the value from someone from inside the Department of Education giving the seminars: *'I think it was a bit better before when there were more people in the department who had that capacity and knowledge'*. This clearly shows that there is

demand for in-house legal training; however, the department may not have the capacity to deliver that training.

Principal Beau discussed the relevance of in-house professional development: *'if I went to a training session on suspensions, the focus would be on procedural fairness, there is an assumption in education where you look after kids. There are always two sides to every story, so that's built into the process, we always try and get two sides of the story. The first thing you tell new teachers is, "Don't judge the child by the behaviour, find out what the iceberg behind them is".'* Therefore, the professional learning may not always be marketed as education law, legal training or procedural fairness; however, the elements of law may be embedded into the relevant policies and procedures being taught at the relevant professional learning seminar.

Lawyer Boyd advised that *'we also regularly do presentations; we do our own presentations internally but also more often than not we get a lot of requests for presentations and professional development days ... go and talk to principals or school admin managers about emerging legal issues or current legal issues'*. Lawyer Boyd commented that with external providers such as LawSense/Legalwise *'our legal officers present at those and don't get paid, yet all of our principals get charged, so I question why are we not running our own ones?'* Finally, Lawyer Boyd stated that *'it would be good to present a module on procedural fairness ... I would definitely encourage that'*.

Principal Beau, who is in charge of a school with over 1,000 students, commented that learning about the law and legal requirements takes a whole leadership approach each week: *'from a simple document or a set of documents or an issuance of documents from the department, which I really value called School Biz.'* There are several categories in School Biz; however: *'it's like your weekly update of regulations or policies and that the first place'*. Principal Beau has taken a pro-active approach in upskilling their entire executive team, capacity building the next generation of school principals so that they are cognisant of the legal requirements of a school principal in decision-making. In contrast to the DEL and Principal Beau, Principal Cole found that they did not spend any time on legal matters and simply contacted the legal directorate if there was an issue at the school: *'I find that all really boring. I mean really, it's on a need to know basis and because I know I've got someone to go to or a team to go to, that will provide me with the information I need to know, I don't need to know that. If I wanted to be a lawyer, I would have been a lawyer.'* Despite the legal issues principals deal with daily, whether directly

or indirectly, they do not have to be lawyers, and this sentiment has been shared by others; however, they still need a sound knowledge of the law.⁷⁷⁵

Finally, when training school principals, the EPAC member stated: *‘But I know that when I train people, I’m always saying to them, “Be fair”. If you just remember what if you’re doing, the people have a right to know what the concern is, or the issue is. They have a right to be heard. The same with parents, don’t tell them you’re too busy and you might be able to meet with them for 10 days when you’ve got a really serious issue. Sometimes you’ve got to swap something around and meet with a really distressed parent immediately because they might be going to tell you something really serious. The flexible competent manager understands that, the person that goes on the leader, “This is my school, and I’m not going to be told how to manage it, and I’ve got back-to-back appointments.” Is the one that’s likely to come to our attention because they haven’t treated people fairly.’* The EPAC member has designed their training in accordance with the rules of procedural fairness discussed in Chapter 3, particularly around the hearing rule and the application of the rules of procedural fairness in the school context.

5.6.5 Director, Educational Leadership Legal Training

What is often lost in public education, is that the decision-making process does not stop with the principal, rather a review of a principal’s decision is lodged with the DEL; this means that the decision is no longer controllable by the principal, which is what this thesis seeks to investigate. As part of the interview with the EPAC member, the question was asked whether the landscape could be improved by also upskilling DELs on the elements of procedural fairness. The EPAC member stated: *‘that’s what we have done, we have brought in the Customer Service Commission, and they ran particularly targeted training to DELs in*

⁷⁷⁵ Howard J Eberwein III, ‘Raising Legal Literacy in Public Schools, a Call for Principal Leadership: A National Study of Secondary School Principals’ Knowledge of Public School Law’ (EdD Thesis, University of Massachusetts, 2008); D Schimmel and M Militello, ‘Legal Literacy for Teachers: A Neglected Responsibility’ (2007) 77(3) *Harvard Educational Review* 257; Philip H Wagner, ‘An Evaluation of the Legal Literacy of Educators and the Implications for Teacher Preparation Programs’ (Conference Paper, Education Law Association Conference, 16 November 2007); Allison Trimble, ‘“Working in the Dark”: Principals and the Law’ (2018) 24(1) *Leading and Managing* 16; Allison Trimble and Neil Cranston, ‘Education Law, Schools and School Principals: What does the Research Tell Us?’ in Karen Trimmer, Roselyn Dixon and Yvonne Findlay (ed), *The Palgrave Handbook of Education Law for Schools* (Palgrave Macmillan, 2018) 23; Allison Trimble, ‘Education Law, Schools, and School Principals: Findings from a Mixed Methods Study of the Impact of Law on Tasmanian School Principals’ (2020) 23 *International Journal of Law and Education* 70, 78; Mark Butlin and Karen Trimmer, ‘The Need for an Understanding of Education Law Principles by School Principals’ in Karen Trimmer, Roselyn Dixon and Yvonne Findlay (eds), *The Palgrave Handbook of Education Law for Schools* (Palgrave Macmillan, 2018) 3.

complaints handling and dealing with difficult conversations ... we're about to offer to run another round of that to new DELs because I think there's been about a 25% turnover in the first year, which is big'. EPAC, who deal with teacher conduct, have the view that DELs provide support to principals when they are performance managing staff: 'there is an expectation that Directors, Educational Leadership have 20 schools each that they would be providing support and advice to their principals and there is also a lot of online information to help them'. Therefore, given the career trajectory of teachers through the ranks, if the training is delivered to aspiring deputy principals, DELs would also be trained by the sheer nature of the promotion process. The issue here lies in that there is significant work required to upskill current DELs and those who laterally transfer into DEL positions without deputy principal or principal experience.

Lawyer Dion similarly commented: *'The DELs, they are senior staff who have lived and breathed for many years and would have seen a lot of issues so I think that the DELs is a really important position looking over a number of schools ... as someone that can say, "You've just raised that problem ... have you thought about X, Y and Z" and just be mindful of it.'*

Lawyer Finn is of the same view: *'I think the training maybe with the people above them [referring to the principals' supervisor, ie the DELs]. I do often get some frustration with their supervisor saying, "I think this is the answer, but just call legal and see". There's something that they've given the right answer and they know it's the right answer, they just want to cover themselves by saying ring legal' therefore, I think better training with the people above the principal would help the principals because they are the ones supervising the principals.'* Furthermore, Lawyer Finn discussed complaints: *'if it's coming up as a complaint, it is not coming to legal, it is going to the director who is dealing with it, I guess that's where it would come back to us more as an issue as they have made a complaint and that person needs help with that complaint'.*

5.6.6 Education Law Training by External Providers

An analysis of legal training in procedural fairness from 2015 to 2019 yielded six references to topics on procedural fairness, of which the PhD research student provided two seminars at an ANZELA conference (Auckland, 2016 and Melbourne, 2019) and the research supervisor provided one seminar at an ANZELA conference (Melbourne, 2019). Of a broader topic was complaint handling with 14 presentations on effective complaint handling, of which some

incorporate the rules of procedural fairness when managing complaints. The other areas of significant discussion at conferences and seminars for the period 2015 to 2019 are listed below.

Table 6: An analysis of legal topics covered by legal providers such as Legalwise, LawSense and ANZELA between 2015 and 2019

Area of Law	Number of Seminars/Conference Topics
Child protection	8
Disability (discrimination, mental health, inclusion)	23
Teacher conduct (behaviour, HR, ICT usage, mental health, negligence, performance management, personal life, recruitment, sexual misconduct, and workplace health and safety)	48
Family law	6
Legal knowledge of principals	5
Safety	10
Tort liability	3
Other (not listed in any one of the other categories)	45
Parental behaviour	4
Privacy	4
Procedural fairness	6
Complaint handling	14
Sport law	13
Student discipline (attendance, bullying, ICT, sexual misconduct and violence)	29
Approximate number of seminar topics between 2015 and 2019	218

In the case of Principal Beau, where possible they send members of the executive team to legal seminars: *‘I send people to legal seminars and we have a culture in the school of sharing, which we have very long executive meetings once a week, three hours, but at least an hour of that is people sharing from conferences because again, we don’t have much money, I can’t spend much money on it, but what we get, we make work.’* When engaging with external providers, who can charge in excess of \$500 for a one-day education law conference, Principal Beau encourages staff to share what they have learnt at these conferences. However, as the staff member may be a novice in an area such as procedural fairness, they may not always convey

the correct information to staff and subsequently the entire school gets the elements of procedural fairness incorrect.

As Principal Duke has been a principal for over 25 years, they felt competent across most areas of law in the school context: *‘I know that there are quite a few seminars being run, particularly at the University of New South Wales where they are having lots of principals and others are going along to hear various issues, etc. I have not felt the need to do that, but they’ve been interesting, some of them. I, at some point might find some time to go and have a look at it. I think there’s training out there that’s interesting and probably if I were a beginning principal, I’d probably do it, but I’ve been around 25 years as a principal, so I am pretty sanguine about all of those things. But I believe that the training is out there, and certainly the awareness raising is out there if you want to take advantage of it, that’s a great thing that you should do.’* However, Principal Duke supports any aspiring principal to undertake aspects of legal training as this would assist in their development and that of the Department of Education. Furthermore, Principal Duke is in a unique situation, having completed two years of a law degree prior to transitioning to a career in education: *‘well I did study law for a while, so I knew something about it’*. This may have affected their decision to attend legal training.

Trimble’s Tasmanian school principal study revealed that most principals had attended legal professional development in the preceding 12-month period.⁷⁷⁶ It was unclear as to whether this was delivered internally or externally to their schooling system; nonetheless, principals were engaging with some level of professional learning in education law.

5.6.7 Pre-Service Teaching Training/Formalised Education Law Training

Australia is different to the US in that pre-service teachers, teachers, deputy principals and principals do not have to complete a formalised education law course from an accredited higher education provider. PhD dissertations from the US have argued that education law should be included in school administrator preparation programs at an Educational Administration/Educational Leadership level:

Those who take the Educational Leadership/Educational Administration graduate program often aspire and gravitate towards administrative positions within schools. School administrators represent both the first and last line of defence when it comes to ensuring the safety and well-being of both teachers and students within a school setting.

⁷⁷⁶ Allison Trimble, ‘Education Law, Schools, and School Principals: Findings from a Mixed Methods Study of the Impact of Law on Tasmanian School Principals’ (2020) 23 *International Journal of Law and Education* 70, 74.

It is imperative that persons in these positions of responsibility have adequate legal education training.⁷⁷⁷

It is now a requirement in all 50 US states that aspiring school principals successfully complete an accredited education law course from an accredited university.⁷⁷⁸ Principal Beau commented that ‘*you don’t get much of it in your teacher training at all*’, which is consistent with the current environment where education law is rarely offered as a standalone course at university in either Bachelor of Education and Master of Teaching degrees. There is sometimes an elective education law course in a professional Master of Educational Leadership program, such as EDUC5523 at The University of Western Australia. The University of Notre Dame Australia Sydney Campus offered an elective education law course to both undergraduate pre-service teachers (EDUC4022 Education Law for Teachers and School Leaders) and Master of Teaching students (EDUC6057 Education Law for Teachers and School Leaders) in 2020. Furthermore, EDUC6057 Education Law for Teachers and School Leaders is offered as a standalone course for postgraduate students from July 2020. A comprehensive search of all education law courses around Australia found that La Trobe University has offered an Education Law and Ethics course since 2017 at the masters level that is still extant,⁷⁷⁹ the Australian Catholic University previously offered a Graduate Certificate in Education Law; however, this has not been offered since 2014.⁷⁸⁰ Similarly, pre-2016, The University of New South Wales offered EDST5439 Legal, Industrial and Ethical Issues in Educational Leadership.⁷⁸¹ Lawyer Ares stated: ‘*I suppose a unit in education law in initial teacher training ... we get asked to come along to lecture people at various times who are undergraduates and we give them a talk on child protection or duty of care and so on, so I mean it must be in some bits of something but it’s kind of random.*’ Findlay, a Canadian education law scholar, suggested that a general understanding of the application of legal principles for school principals may help avoid possible litigation and ensure compliance with the law:

⁷⁷⁷ Jerome G Delaney, ‘The Value of Educational Law to Practising Educators’ (2009) 19 *Education & Law Journal* 119.

⁷⁷⁸ Ralph Mawdsley and Joy Cumming, ‘The Origins and Development of Education Law as a Separate Field of Law in the United States and Australia’ (2008) 13(2) *Australian and New Zealand Journal of Law and Education* 7.

⁷⁷⁹ La Trobe University, ‘LAW5EDU Education Law and Ethics’, *Handbook 2022* (Web Page) <<https://handbook.latrobe.edu.au/subjects/2022/law5edu>>.

⁷⁸⁰ Australian Catholic University, ‘Graduate Certificate in Education Law’ (Web Page) <https://archives.acu.edu.au/handbook/handbooks/handbook_2014/faculty_of_law_and_business/coursecampus_tables/postgraduate_courses/graduate_certificate_in_education_law.html>.

⁷⁸¹ The University of New South Wales, ‘Legal Industrial and Ethical Issues in Educational Leadership: EDST5439’, *Handbook 2015* (Web Page) <<http://legacy.handbook.unsw.edu.au/postgraduate/courses/2015/EDST5439.html>>.

If administrators do not have knowledge of education law concepts and relevant legislation and statutes, they do not have the basic building blocks to inform their understanding and to put solid decision-making into practice.⁷⁸²

In relation to education law programs for school administrators in the UK, Professor Neville Harris commented that:

There has not been any general drive to ensure legal literacy among teachers or head teachers in the UK and there is certainly no requirement that principals receive any legal training in education law or any other area. Nevertheless, it has long been generally recognised that the law governs most aspects of education management and that head teachers (i.e., school principals) in particular need to be aware of the legal framework. Some years ago — at least 25 years ago — the ‘Head Teachers’ Legal Guide’ was published, as a loose-leaf encyclopaedic guide (with periodic inserts). (I am not sure if it is still published.)

Around 10–12 years ago the Government decided that all head teachers should study for a professional qualification in Headship. To my surprise the prescribed syllabus contained nothing on the law.⁷⁸³

Trimble, an Australian researcher in Tasmania, similarly mentioned that the lack of tertiary education law legal training for teachers and principals is of serious concern.⁷⁸⁴ Furthermore, Trimble added that in her study, there was only a small number of school principals, mainly from the independent and Catholic school systems, who had undertaken any formal tertiary education law course.⁷⁸⁵ Therefore, teachers and principals would benefit from some understanding of the law, particularly in relation to the application of the rules of procedural fairness, which takes time to understand fully through case analysis and problem questions rather than ad hoc seminars on the legal obligations of teachers and school principals.

5.6.8 EPAC Review Database of Decisions to Inform Principal Legal Knowledge

One of the recommendations of the Tedeschi review was to have a database of decisions so that similar issues could be decided in a consistent manner. The EPAC member was asked whether the database would come to fruition. The EPAC member answered that *‘it will happen, the challenge will be pulling the decision-making out of that in a way that’s de-identified and*

⁷⁸² Nora M Findlay, ‘In-School Administrators’ Knowledge of Education Law’ (2007) 17 *Education & Law Journal* 177, 201.

⁷⁸³ Email with Professor Neville Harris to the author, 6 February 2014.

⁷⁸⁴ Allison Trimble, ‘Education Law, Schools, and School Principals: Findings from a Mixed Methods Study of the Impact of Law on Tasmanian School Principals’ (2020) 23 *International Journal of Law and Education* 70, 74.

⁷⁸⁵ Ibid.

palatable to people, surprisingly despite this being a huge organisation, the nature of such, but some of the conduct makes it very easy to identify a person'. This process of being able to learn from past decisions would be similar to how legal cases are decided. To provide this information, *'the process is not fast nor cheap, nor understandable at the moment as we have to do that manually'* so it will take some time before those decisions are available.

5.6.9 Lawyers Participants — Legal Training for School Principals

As previously stated, the NSW Department of Education through a series of in-house online legal training modules called Credential provides school executives (assistant principals, deputy principals and principals) with some legal knowledge; however, there are no modules specifically on procedural fairness. Furthermore, the in-house legal directorate provides legal seminars to schools, principals and directorates in an ongoing manner. The frequency of these seminars and training is unknown so therefore it could be assumed that these are on an ad hoc basis. This appeared to be consistent with what the principals encountered, as they send staff to external providers where in-house NSW Department of Education lawyers are often presenters.⁷⁸⁶

5.6.9.1 NSW Department of Education Internal Lawyers

Lawyer Ares, who was interviewed in 2014 when the study commenced data is still relevant as similar themes emerged with the interview participants that took place in 2019, was able to provide a sound overview of the general legal training for school principals that occurred pre-2015. Lawyer Ares stated that *'we have a range of talks that we go out and give to particular groups that we organise in here as seminars'*. Lawyer Ares discussed the degree to which those seminars are provided, in that when the NSW Department of Education had a major state conference, there was *'one on privacy and one on discrimination/disability discrimination law'*. The approach taken here is one of dissemination in that those who attend are encouraged to go back to their schools/districts and inform others. The conferences are often *'a day long and they have probably 150 participants from around the state'*. Lawyer Ares discussed how executive directors and the structure of the NSW Department of Education affect the training provided from a legal perspective: *'they will have a conference of principals for that area where they might have two to three hundred people come along and they're doing professional development on a range of different issues, it's not just legal services, they generally have a*

⁷⁸⁶ See LawSense <<https://lawsense.com.au/school-law-nsw-state-schools>> where several presenters are from the NSW Department of Education.

legal segment at those things'. In reference to the in-house legal training seminars provided by the NSW Department of Education, Lawyer Ares discussed how many legal seminars there are given around NSW to the approximately 2,200–2,400 principals, including those from the 399–401 government secondary schools. Lawyer Ares stated that *'at a rough guess we'd be giving thirty or forty talks a year around the state of one kind or another ... and we do the odd, internal kind of social media network thing'*. In terms of legal training and knowledge, Lawyer Ares focussed on recurring situations and issues rather than isolated complex cases: *'being aware of the general attributes of the law as applied to them I think is important ... So, I think for example those kinds of laws where it's important for them to establish systems or those kinds of laws where they are going to be coming up with repetitive ... the same kind of issues are going to be coming up repetitively and not just once-off kind of cases ... they need to be aware of those.'* This would link back to a case based system where principals could identify major recurring themes and issues across multiple schools.

Lawyer Ares commented that the AITSL standards would go some way to assisting and directing principals to undertake legal training: *'I think it would be good to have more training for principals ... and I'd like to see it as an expectation in those standards that people more explicitly know about legal things ... This is the role of the principal that you need a standard that related to understanding your legal responsibilities as a principal, and I think it would be helpful to have that as a standard.'* It is useful to note that the AITSL standards require principals to have knowledge of legislative and policy requirements in serving the broader school community.⁷⁸⁷ When asked the best way to deliver the training, Lawyer Ares responded that *'I would give them scenarios and get them to understand in terms of their own experience of where the law can become problematic for them, and then they have the capacity to sit down and talk and discuss perhaps with colleagues about how could we introduce systems to prevent that or what are we doing in our school.'* Lawyer Ares further discussed the practical limitations of providing this type of professional learning to principals: *'we have a heavy workload, and it does take time to prepare presentations, to get the scenarios and get to organise something that will be felt to be engaging'*. Therefore, this may suggest why the private sector, for example, Legalwise and LawSense, have filled this gap as the NSW Department of Education Legal

⁷⁸⁷ Australian Institute for Teaching and School Leadership Ltd, 'Australian Professional Standard for Principals' (Web Page) <<https://www.aitsl.edu.au/tools-resources/resource/australian-professional-standard-for-principals>>.

Services Directorate may not have capacity to deliver the overwhelming demand by school executives for legal training.

When specifically addressing what would be the best training for school principals in procedural fairness, Lawyer Boyd stated: *‘Face-to-face training I really think for now is still the best ... and also training that involves, we give them all of this information but then we do some sort of case scenario workshop, here’s the scenario, what would you do?’* When reflecting on some of the seminars involving school principals, Lawyer Boyd, who has facilitated some of this learning, stated that *‘what we’ve done in the past for some legal seminars is, we have had the issue and then we have had the principals all working in groups, had a legal person facilitate and come around and help ... I think that has worked really well.’* Lawyer Boyd also goes further in that a face-to-face seminar/program would best equip principals; however, long term learning and support is what is necessary: *‘It is useful as well I think to have a suite of online resources, even if they do that training, they can then refer back to it.’* Lawyer Boyd is cognisant of the vast nature of the State of New South Wales and commented that *‘even the online modules would be particularly useful as I think people in rural areas often complain they don’t get enough attention’.* Lawyer Boyd further added that in providing training, a holistic approach needs to be considered: *‘you would want to have some workshops in all districts and have the option for people to Skype in or do webinars, things like that’.* Lawyer Boyd also took on the demographics of the NSW principals, in that *‘online learning modules and then people have to do an assessment or something interactive at the end ... and I think it really interesting to give a time for questions ... talk about examples they have actually dealt with’.*

When asked about legal training for school principals, Lawyer Finn’s view was that *‘from a lawyer’s perspective everyone should be trained ... My gut feeling is that they could do training and assistance, but given how busy they are, and I know how much they have got to be across all those other areas of law we discussed, I certainly think good training in procedural fairness at the beginning as they are inducted would set them up well.’* However, as a competing factor, Lawyer Finn also mentioned that principals are time poor and the legal training given is limited due to time constraints: *‘even when we do legal training it’s an hour, and you feel like, how much do we cover in an hour? Look, more time spent training would be great, but I don’t know where that’s going to come from’.*

Lawyer Finn discussed how aspects of procedural fairness are embedded within NSW Department of Education policy documents and that if principals followed the relevant policies, they would be well supported in complying with procedural fairness: *'I think the fact that a lot of the procedural fairness is set out in the steps of the policy that if they are getting training on knowing how to follow the policy and that is where we are involved in making sure that policy is correct in the first place.'* However, Lawyer Finn understands the complexities of schools and the challenges that principals face due to their high workload: *'what they need is the information at their fingertips, to be able to access because they're so busy, which we're always struggling to make it accessible in any way possible for them in a form that is manageable for them, for the situation they are dealing with'*. Lawyer Finn stated that principals need *'time to absorb the information that they're getting I guess is going to come from where? I don't know how comprehensive training is for principals and how much legal aspects are a necessary part of it. When we go along and do training for induction principals, they have a whole lot of sessions that they can go to, and they choose to come to us or not. I guess if they don't choose to come to our presentations, what does that mean for their legal knowledge? It's not compulsory.'* Therefore, in Lawyer Finn's view, principals need a level of knowledge and understanding to know when and where to seek advice to complex problems. Additionally, principals need time to comprehensively understand the legal concepts applicable to their decisions.

Lawyer Gabe discussed a paradigm shift in moving away from legal training into professional development: *'a scenario based professional development program works well where you have got people working in small groups and they discuss and they network and inexperienced principals talk to experienced principals, and that can sometimes be the cloning of terrible practice, but often it's good ... I think that is a good way of doing it, and one thing I'm calling it is legal compliance can get people's attention and interested because we found that people are interested in it ... I do a little one called litigation minimisation strategies.'*

All the NSW Department of Education in-house lawyers attested that school principal legal training was best delivered via face-to-face scenario-based learning based on real-life situations that had either been dealt with by the in-house lawyers or experienced by the principals themselves. Furthermore, small group-based facilitated learning had been received best by school principals in previous training delivered by the NSW Department of Education Legal Services Directorate.

5.6.9.2 External Lawyers

Several external lawyers, who work on NSW Department of Education cases and were identified from Legalwise and LawSense seminar website promotional material, were asked their view on what legal training could be given to principals to assist with their understanding of the rules of procedural fairness. The barrister participant supported the Tedeschi review; according to the barrister, people learn best through case study analysis and that if principals were able to read and comprehend the decisions being made by the department, there may be some consistency in decision-making: *‘I think some of the best learning occurs through case study analysis, apply the theory to a practical scenario, I think that lends itself to a higher order learning and by having those databases and a bank of past decisions and they would be anonymised of course that, that would provide a really good starting point for teachers.’* The barrister went further in that the principals *‘can almost type in and look as we do with precedent and look at similar cases and look at how the principles were applied in a practical sense and/or where they fell down and so the database would include of course, cases where EPAC has been successful but also those in where they have not, and there’d be learning on both fronts, so I would like to see active learning from case studies’*. The Tedeschi review is good because the author *‘is quite scathing towards EPAC, but he also comes up with 13 recommendations as to how it can be improved, with reference to case studies, but I do think case studies is the way to go rather than just standing up, and this is procedural fairness, and gaining this black letter law approach, which is not likely to resonate [with principals]’*. The barrister finally added that with respect to a case study approach for learning about procedural fairness and education law, *‘a text on education law with reference to case studies ... a plain English guide manual with some case studies I think could be helpful’*.

The second main point supported is the notion that external providers provide some legal seminars on education law generally; the barrister also commented that it is the same names, and that the people giving the seminars are on the panel of the NSW Department of Education, which may provide a biased view. The Barrister wondered *‘if there would be scope to bring in and hear from some of the teachers who feel as though they’ve been aggrieved, so that I guess holistic training could happen’*.

Lawyer Cain, who is abreast of both the public and Catholic education systems, identified that both systems *‘have very good training programs and they have in-house training days at the beginning of the school year, and I think they have been pretty effective, and they seem to cover*

a whole range of issues, I've had to address them on occasion ... I think the amount of legal training overall is pretty good.' When asked how principals best access training, Lawyer Cain commented that *'they generally get it in-house and the state school system has got pretty sophisticated resources available to them, and they have handbooks and those types of things, which summarise the legal position in relation to contracts and torts and negligence, and risk warnings, and school camps, and procedural fairness'*, which indicates that principals mainly get their legal knowledge from policy documents; however, they need to understand the policy documents and how the rules of procedural fairness apply. Similarly, Lawyer Cain discussed how principals do *'a lot of external training by attending many specialist education programs such as dedicated conference convenors who specialise in the education sector, and they put on excellent programs, often on a two-day program, covering just about all these legal issues that we have been dealing with ... so they get it internally and externally'*.

Lawyer Dion commented on the already established external legal training for school principals in that principals can attend *'practical law sessions and I speak at one ... I think it's Law Sense, the school law program and that's run in a state school stream'*. Lawyer Dion focused on the higher order thinking required of principals when solving legal problems: *'we do half-day sessions on different topics to get principals to understand and think about these issues outside of their everyday working environment and to think about the aftermath of things and when things go wrong'*. Lawyer Dion reflected further on the value of the external legal seminars that encourage the lived experience of school principals: *'I think they are very valuable, those external learning forums because it's getting the principal outside of their school and it gets them listening and hearing other principals' stories.'* Lawyer Dion also mentioned that it gives the principals the sense that they are not alone in dealing with legal issues at their school as principals at other schools are facing similar issues, and the principal provides a possible strategy to solve the problem that maybe legally compliant: *'principals understand that they are not alone in the issues that they are facing so that's comforting for them and secondly that external perspective from someone outside of the department'*. Lawyer Dion similarly commented on the amount and way in which training could be delivered for school principals: *'I think they would benefit from it, it's how much training as the public education system is so full of training, which has an impact on teaching ... so I think there has to be a balance ... so I think it needs to be incorporated into existing training ... I think it would be worthwhile looking at a refresh of what they are currently doing in their training and looking at what is valuable, what is less valuable, and reworking it, but yes, absolutely.'* Lawyer Dion specifically

commented on the value of training in and understanding of procedural fairness: *'because it adds so much value to a process and it stops or prevents or limits the risk of having to go back again and start again or having to undo an entire process because it's been flawed from the beginning, and that's any government department'*. Lawyer Dion commented on the complexity of complying with procedural fairness in any government department: *'the whole public sector is rife with challenges on procedural fairness and in part because you look at policy and a procedure and it's five pages long and it refers to numerous other guidance sheets and requirements and by the time you step through everything you think, well, I'm lost and it's not human anymore'*.

Lawyer Ezra is of the view that principals need to be trained in education law: *'they need to be trained, the assumption should not be made that, particularly given that so many principals are teachers who have been promoted because they have an aptitude for management and leadership, they need training ... some get it, some don't'*. Lawyer Ezra, who developed some of the legal modules Credential, commented that *'for principals in departmental schools, the department's now got this amazing set of online materials that are accessible to principals and aspiring leaders'*. Lawyer Finn further added that principals in NSW government schools have *'the Legal Services Division which provides advice, which is a form of training in itself, and I am assuming that they are running seminars for principals as well'*. When referring to the online modules from Credential, Lawyer Finn believed that the learning must be *'multifaceted in that it is a combination of live seminars, written materials, and learning on the job ... the most intelligent people use real-life experiences to learn from'*, which further enhances the value of the lived experience of school principals.

Lawyer Finn similarly commented that a case study approach would be of value in that when solving a legal problem, a principal could consider *'I remember this is what happened when this happened last time, how and I going to apply that knowledge now?'*, which Lawyer Finn refers to as *'experiential learning'*. Lawyer Finn was further asked whether there should be a dedicated topic in legal training for school principals on procedural fairness, to which they responded: *'it's a concept that's relevant rather than a topic in its own right'*. Lawyer Finn stated quite clearly that *'procedural fairness is just, in my head, after all of these years, procedural fairness boils down to give all the people involved a right to be heard one way or another, to have their story taken into account, don't prejudge, don't act too fast or too slowly, and keep the matter as confidential as is reasonably necessary'*. Finally, Lawyer Finn

commented that it plays out in all kinds of different ways, shapes and forms in real life; therefore ‘it’s not so much a need for a course on procedural fairness, rather, they need to understand what procedural fairness is, and then be able to apply that principle in all these different scenarios in a given seminar where they can apply that knowledge’.

5.6.10 Conclusion and Key Findings — Theme 4: Legal Training in Procedural Fairness

Through the semi-structured interviews conducted with the NSW government secondary school principal participants, the DEL, the EPAC member, internal lawyer and external lawyer participants, the theme ‘legal training in procedural fairness’ yielded several key findings:

- Experience in managing and dealing with legal issues — All the NSW government secondary school principal participants identified that experience played a large role in their ability to understand legal issues, most of which was gained during the deputy principalship.
- Deputy/aspiring principal legal training — A course in procedural fairness would be best targeted at the assistant/deputy principal level (or relieving/acting deputy principal level in high schools). As deputy principals are subsequently promoted to positions such as principal or DEL, these skills could be further developed to cater for a review of decisions rather than for the initial decision-making. This would ensure that the NSW Department of Education complied with the legislative requirements of procedural fairness and decisions would be made and reviewed at the school level rather than being escalated higher up within the Department of Education and the decision-making process taken out of the hands of the principal.
- Principal legal training in the US, Canada and the UK — In all 50 states of the US, all principals must undertake a course in education law at an accredited university as part of principal licensure.⁷⁸⁸ The same is not the case in Australia, as discovered through the qualitative data analysis.
- Education law legal providers — There are several education law providers in the market in NSW including Legalwise, LawSense and ANZELA as well as ad hoc university courses in education law at both the undergraduate and postgraduate level.
- External commercial education law providers — Legalwise and LawSense charge the NSW Department of Education in excess of \$500 per participant for a one-day seminar.

⁷⁸⁸ Ralph Mawdsley and Joy Cumming, ‘The Origins and Development of Education Law as a Separate Field of Law in the United States and Australia’ (2008) 13(2) *Australian and New Zealand Journal of Law and Education* 7.

A more cost-effective approach may be to use a consulting firm, which charges \$4,200 per day and caters for 30 staff at the school site (the equivalent of \$140 per participant) or use in-house facilitators from within the NSW Department of Education.

- Education law training scenarios — Several participants mentioned that scenario-based learning was the most beneficial to school principals as they were able to learn from others who had experienced similar issues or legal problems.
- Procedural fairness training — Several participants identified that when professional learning occurred in areas such as student discipline or industrial relations, aspects of procedural fairness would form part of that professional learning.
- University education law courses — A gap in education degrees was identified as there are only a few education law courses in Australia at the undergraduate and postgraduate levels.
- In-house legal training — What may be of value is developing a program or a suite of programs that a principal could complete while they are a deputy/assistant principal prior to taking up the principalship. The NSW Department of Education has been proactive in this sense in developing the Credential suite of legal modules for pre-principals to complete; this is consistent with Trimble’s study.⁷⁸⁹ A recommendation for the NSW Department of Education would be to evaluate the effectiveness of the Credential program. Furthermore, it was found that the NSW Department of Education Legal Services Directorate hot-desk legal advice was one way in which the NSW Department of Education trained their principals about how to effectively manage legal issues. While the quality of the legal services provided by the NSW Department of Education Legal Services Directorate was not part of the research, several principals spoke highly of this directorate and the services that they provide.

5.7 CONCLUSION

Chapter 5 has presented an analysis and discussion of the themes that emerged from the research, which sought to answer the primary research question:

⁷⁸⁹ Allison Trimble, ‘Education Law, Schools, and School Principals: Findings from a Mixed Methods Study of the Impact of Law on Tasmanian School Principals’ (2020) 23 *International Journal of Law and Education* 70, 74.

- To what extent are New South Wales government (public) secondary school principals equipped to make decisions that are consistent with the administrative law principles of procedural fairness.

The first section of the chapter added to the limited literature on the roles and responsibilities of government secondary school principals, as principal and DEL participants were asked about their duties as a government secondary school principal. Consistent with previous research, the roles and responsibilities were complex, complicated, challenging and endless.

Four themes emerged from the research, which are summarised at the conclusion of each of the themes:

- procedural fairness in policy and procedures;
- student wellbeing;
- industrial relations and procedural fairness; and
- legal training in procedural fairness.

Chapter 6 provides a brief overview of the research; the findings derived from each theme; a set of recommendations to the NSW Department of Education; and suggestions for future research directions.

CHAPTER 6

FINDINGS, RECOMMENDATIONS AND CONCLUSION

6.1 INTRODUCTION

This thesis addressed the question of what procedural fairness knowledge NSW Department of Education (government/public) secondary school principals had when making decisions affecting students and teachers. It has examined the knowledge principals have about fairness, the rules of procedural fairness that apply to decision-making in schools in relation to student discipline, special education, and industrial relations, and finally, where principals obtain their knowledge on procedural fairness. In this final chapter, a brief overview of the thesis is provided followed by a summary of the key findings addressing each of the research questions.

6.2 OVERVIEW OF THE THESIS

A concise overview of each chapter is presented below.

Chapter 1 introduced the research question and set the parameters for the discussion and the issues that were to determine a possible answer to the research question and the research approach. It identified the research problem: that the knowledge and application of the rules of procedural fairness of NSW government secondary school principals were unknown. The theoretical perspective of how procedural fairness applies to the NSW Department of Education principals is explained along with the research methodology and structure of the thesis. Finally, the contribution this research makes to education is examined.

Chapter 2 examined the roles and responsibilities of NSW government secondary school principals. The chapter makes significant reference to the AITSL principal standards,⁷⁹⁰ which attempt to govern the scope of duties of school principals. The literature also discovers that the principals' duties are also derived from internal NSW Department of Education policies, procedures and guidelines. As the final decision-maker at the school level, the responsibility stops with the principal. Any appeal of a principal's decision would be reviewed by the DEL. The chapter then addressed the complex legal context of government secondary schools, including the need for principals to have legal literacy, and the current landscape of legal

⁷⁹⁰ Australian Institute for Teaching and School Leadership Ltd, *Australian Professional Standard for Principals* (Web Page) <<https://www.aitsl.edu.au/tools-resources/resource/australian-professional-standard-for-principals>>.

training of school principals in pre-service teacher training, formal university postgraduate qualifications and principal preparation programs.

Chapter 3 provided a comprehensive overview of the rules of procedural fairness and applied the law to the educational context, specifically in decisions around student discipline, special education and industrial relations. The NSW Department of Education Legal Services Directorate publishes directions around the application of procedural fairness for principals when decision-making.⁷⁹¹ The chapter explained the social importance of procedural fairness through defining procedural fairness, the expansion of procedural fairness, and fairness in decision-making. An examination of how relevant legislation and case law requires principals to apply the rules of procedural fairness was also discussed. A summary of the application of the rules of procedural fairness (namely, the hearing rule and the rule against bias) in the NSW Department of Education can be summarised as follows:

- Inform the affected party of the allegations.
- Inform the affected party of the likely consequences of an adverse decision and why a particular decision would be made.
- Allow for the affected party to be heard, either orally or via written submissions.
- Consider all of the relevant evidence prior to making a decision. Consider whether the affected party has seen all the evidence being relied upon or if there are confidentiality issues around the evidence.
- Allow the affected party to respond.
- Provide all of the details of the decision in writing and provide a copy of the relevant documents; for example, NSW Department of Education policies, procedures and guidelines, most of which are publicly available.
- Appoint an independent investigator, such as a deputy principal, and a separate decision-maker.
- Ensure the principal acts fairly and without bias.
- Self-assess and collaborate with other principals and director educational leadership as to whether they would see the process as being fair, valid and reasonable.
- Outline the appeals process to the affected party.
- Document all action, discussions, investigations, meetings and decisions.

⁷⁹¹ NSW Government, Department of Education, 'Procedural Fairness in the Department of Education', *Legal Issues Bulletins and Guidelines* (Web Page) <<https://www.education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/procedural-fairness>>.

The chapter culminates in explaining why providing the reasons for a decision is beneficial to the school community; what constitutes a reasonable decision; what appeal options are available to affected parties; and finally, what is fair and reasonable in the school context.

Chapter 4 outlined the research design using a basic qualitative case study research methodology to answer the research questions. Justification is provided as to why a case study design is the most appropriate methodology when examining a bounded system such as a single Department of Education. The recruitment approach of participants is outlined along with a justification as to the number of participants in this study. The coding process of the interview data is explained. CAQDAS software NVivo 12 was used to code the interview data in this research, which allowed the researcher to undertake a higher level of analysis when developing conceptual themes. Finally, researcher reflexivity and ethical protocols are outlined.

Chapter 5 firstly adds to the literature on the roles and responsibilities of government secondary school principals as the principal participants were asked to outline their roles and responsibilities. The second part of the chapter introduces the research findings and provides a discussion on NSW government secondary school principals applying the rules of procedural fairness in their decision-making in the areas of student discipline, special education and industrial relations. The findings and discussion develop four broad themes to address the research question. The four themes uncovered are:

- Theme 1: Procedural fairness in policy and procedures. Theme 1 identified that principals were challenged in complying with procedural fairness; were frustrated with procedural fairness in the school context; viewed fairness as a fundamental element; faced situations that gave a level of perceived bias in their decision-making; understood the complexity of procedural fairness; understood that internal review processes were fundamental to good government decision-making; and understood that to afford procedural fairness was time consuming. The lawyer participants were able to give a holistic overview of the quality of procedural fairness applied in NSW government schools.
- Theme 2: Student wellbeing and procedural fairness. Theme 2 discovered that student wellbeing and procedural fairness fell into two sub-themes, namely, student behaviour management and inclusion. Student wellbeing is of paramount importance to the NSW Department of Education. This is governed by several policy, procedure and guideline documents that the principal is expected to comply with; in addition, principals are

required to develop their own school welfare plan, which is subject to review by the DEL. The principal participants relied on NSW Department of Education policies to inform their processes and decisions when managing student discipline and special education. Principals require an understanding of the rules of procedural fairness when decision-making with respect to students with special education so as to avoid Australian Human Rights Commission complaints or litigation.

- Theme 3: Industrial relations and procedural fairness. Theme 3 was concerned with teaching staff at the school, particularly serious misconduct and underperformance of teaching staff. In the vast majority of cases, the principal refers the matter to EPAC, who investigate the matter and make a series of recommendations or decisions. The principal participants in this study found the teacher improvement plan process for underperforming teachers to be challenging, time consuming and emotionally, physically and financially draining for their school community. Two case studies were provided by the lawyer participants involved in industrial relations matters concerning the underperformance of teaching staff.
- Theme 4: Legal training in procedural fairness. Theme 4 examined the ways in which principals were trained in procedural fairness and what recommendations would be appropriate for a training program. The principal participants all learnt about procedural fairness through the deputy principalship, with many identifying their previous principal as responsible for their knowledge in this area of law. Several options for training are developed, from informal internal NSW Department of Education training through to the Credential program and fully accredited university courses. The key finding around training is that the participants preferred a face-to-face course delivered internally by the NSW Department of Education that used a case study approach applying the rules of procedural fairness to the decision-making process and principals and schools were not charged for attendance.

6.3 KEY FINDINGS OF THE RESEARCH

The primary research question:

To what extent are New South Wales government (public) secondary school principals equipped to make decisions that are consistent with the administrative law principles of procedural fairness

is answered by reference to the three research sub-questions.

6.3.1 What Knowledge do Principals in New South Wales Government (Public) Schools have about the Rules of Procedural Fairness?

The study found that the NSW government secondary school principal participants had a sound understanding of the rules of procedural fairness in their decision-making. While the principal participants may not have referred to the exact legal terms, they did understand that procedural fairness needed to be afforded to individuals in matters where a decision may be made that would adversely affect an individual. The participants understood the concept of fairness, which is the essence of procedural fairness; that is, what is fair in the circumstances. The learning of the concept of procedural fairness was generally developed during their tenure as a deputy principal and without formalised training. The findings may be different in situations where a principal has not been a deputy principal prior to taking up the principalship (eg primary school principals) or has not been exposed to appropriate internal mentoring around the rules of procedural fairness.

6.3.2 What are the Rules of Procedural Fairness and How do They Apply to Principals' Decision-Making in Relation to School Discipline, Special Education and Industrial Relations?

The rules of procedural fairness consist of two main elements: the hearing rule and the rule against bias. The rules of procedural fairness were unpacked in Chapter 3, with examples applied within the chapter to the government school context. The principal participants were provided with a vignette containing student discipline, special education and industrial relations scenarios to examine their knowledge in applying procedural fairness. The principal participants satisfactorily analysed the vignettes to outline their processes prior to making a decision consistent with statute and case law. Holistically from a NSW Department of Education perspective, the in-house and external lawyers all commented that the NSW Department of Education principals with whom they dealt in general applied the rules of procedural fairness well given the large number of schools, students and employees in the system in the context of student discipline, special education and industrial relations. However, it is evident that there were consistent concerns about a number of issues such as the complexity of affording procedural fairness, the time-consuming nature, and the impact on workload.

6.3.3 *Where do New South Wales Government (Public) Secondary School Principals Obtain Their Knowledge about the Rules of Procedural Fairness?*

Currently the training in procedural fairness for principals is undertaken in an ad hoc manner when they are a deputy principal or at policy update seminars (eg the suspension policy update will include a section on applying procedural fairness prior to suspending a student). This exposes the NSW Department of Education to a degree of risk because the level of mentoring and training is largely unknown. Rather, a formalised procedural fairness training program could be developed for individuals prior to taking up the deputy principal position. It is suggested that the training program should consist of the fundamental elements of law, as discussed in Chapter 3, and would apply the concepts of procedural fairness to real-life case studies applicable to the government education system. The content of the case studies could be drawn from reported cases (note that many cases do not proceed to litigation or are unreported) or from an analysis of the matters the in-house legal officers at the NSW Department of Education deal with. The participants in this study advocated for an in-house training series provided by the NSW Department of Education rather than formalised training by university providers, commercial providers such as Legalwise and LawSense where in-house legal officers present pro bono, but the principals and schools are charged, or not-for-profit organisations such as ANZELA. In resolving this issue, the NSW Department of Education could go out to tender to create a consultancy approach in delivering the training on procedural fairness internally. This approach may improve the conceptual understanding of applying the rules of procedural fairness in student discipline, special education and industrial relations for principals and reduce the unknown understanding of procedural fairness for the NSW Department of Education.

6.4 RECOMMENDATIONS

6.4.1 *Procedural Fairness in Industrial Relations*

Consistent with one of the recommendations in the Tedeschi review is that instead of having one individual decide on industrial relations matters, a committee is convened to determine such matters where the members can debate and express their views prior to making a final determination. Similarly, it may be an appropriate forum for members to advocate for people to be given a second chance, which would improve procedural fairness rather than diminish it. Therefore, in matters involving teaching staff, a panel approach is preferred in deciding the fate of teachers to improve procedural fairness.

6.4.2 *Recruitment of Principals and DELs*

The recruitment of principal and DEL participants was a challenge in this study. From the 112 principals invited to participate in this study, only four (4) participated, and of the seven (7) DELs invited, only one (1) participated. Emails were sent to 112 principals; personal letters were sent to 20 principals and all personal letters were followed up with phone calls.

In the interview with the DEL, the researcher asked the DEL if they could think of any other strategies that could be undertaken to improve recruitment of secondary school principals for the study. The DEL generously forwarded the invitation to three secondary school principals in their directorate; however, there was no response. As part of the interviews with the principal participants, it was found that NSW government secondary school principals receive over a hundred requests annually to participate in research. Trimble,⁷⁹² also experienced similar issues in their education law study in Tasmania, and they looked across all three sectors not just public education.

A recommendation for principal and DEL recruitment in research studies would be to create a centralised research directorate in the NSW Department of Education, which could disseminate invitations to participants. This way, the NSW Department of Education would know exactly how many research projects are happening and teachers and principals could identify areas of interest so a more targeted approach could be taken. It could also be a requirement for teachers and principals to partake in research studies each year as part of their continuing education. Currently, the only metric the NSW Department of Education has on research projects is through the NSW SERAP research repository, which is concerned with ethics approvals; however, some research listed here may be inactive.

In 2019, approximately 50 principals responded to the Tedeschi review, which demonstrates that principals and employees of the NSW Department of Education may only be interested in participating when the research is departmental or government commissioned, and this may be a cultural issue within the department. In 2017, several principals responded to the Deloitte

⁷⁹² Allison Jane Trimble, 'Education Law, Schools, and School Principals: A Mixed Methods Study of the Impact on Tasmanian School Principals' (PhD Thesis, University of Tasmania, 2017).

study,⁷⁹³ which again was an internal NSW Department of Education commissioned report using Deloitte as the consultancy firm to complete the study.

6.4.3 *Formalised Training in Procedural Fairness*

As discussed previously, an internal NSW Department of Education approach to learning procedural fairness through applying real-life case study scenarios for staff at the head teacher (assistant principal) and deputy principal level would be valuable in reducing the associated risk for the department. Due to the internal culture of the NSW Department of Education, it is recommended that this be delivered by an internal directorate where the individuals have been educators, or a consultancy firm working on behalf of the department. A suggested approach is to take the legal requirements of procedural fairness that are discussed in Chapter 3 and use some of the real-life case studies provided by the participants in Chapter 5. The preferred training approach would be to deliver face-to-face training at individual school locations, not just metropolitan schools or at the head office in Parramatta. Several alternatives exist, such as fully online, blended or video conference/streaming; however, the participants in this study preferred face-to-face training. This is the predominant delivery method used by the education law professional development providers in the market; however, only in the Sydney CBD. To improve the efficiency and reach of the training, a suggested approach would be to combine one secondary school with the feeder primary schools, which would be approximately five schools, consisting of one secondary school and four primary schools. This would produce clusters of approximately five principals, eight deputy principals, eight assistant principals and eight head teachers and result in a cohort of approximately 30 participants catered for within the district. An alternative approach is to facilitate the training through the DEL, who is responsible for approximately 20 schools (four high schools and 16 primary schools); however, the training audience would be too large (approximately 100 participants) to deliver case scenarios and have an effective discussion. The secondary–primary feeder school approach may have other professional benefits, such as developing a network between the secondary school and primary school for the schools’ executive teams to compare, for example, the science pedagogical practices used in the primary setting prior to secondary school.

⁷⁹³ Deloitte, *Principal Workload and Time Use Study* (Report, NSW Government, September 2017) <<https://education.nsw.gov.au/content/dam/main-education/gef/media/documents/Principal-workload-and-time-use-study-Nov-2017.pdf>>.

The nominal time requirement to complete a course on procedural fairness would be six hours face to face at the participants school (or a school within the cluster) followed by some professional reading, such as the NSW Department of Education policies, procedures and guidelines, legal issues bulletins, peer-reviewed journal articles, legal cases, etc. It is imperative this training count towards ongoing professional development requirements for teacher accreditation through NESAs⁷⁹⁴ or other state-based teacher registration authorities⁷⁹⁵ for teachers and principals to be amenable to undertake the training. A university level course may not be the most appropriate model for current head teachers, heads of department, assistant principals, deputy principals or principals as school executive members may already have completed postgraduate qualifications such as a Master of Teaching, Master of Education, Master of Business Administration or Doctor of Education, which may not have included any legal training.

6.5 FURTHER RESEARCH

As noted in Chapter 1, the thesis is limited in scope and therefore there are opportunities for further research. Recommendations for future research include:

- Examining the New South Wales government primary school principals' knowledge of procedural fairness who have bypassed the deputy principal position.
- Investigating the procedural fairness knowledge of individuals who have been appointed to the position of Director, Educational Leadership within the New South Wales Department of Education.
- Replicate the same study with a larger principal sample size; however, the sample size in this study was acceptable as the data was saturated.
- Examine how well procedural fairness is applied across the entire New South Wales Department of Education.
- Conduct a similar study in other jurisdictions within Australia or undertake a cross-jurisdictional study, for example, between Western Australia and New South Wales.

⁷⁹⁴ NSW Government, Education Standards Authority, *Professional Development Requirements* (Web Page) <<https://www.educationstandards.nsw.edu.au/wps/portal/nesa/teacher-accreditation/professional-development/pd-requirements>>.

⁷⁹⁵ See, eg, Australian Capital Territory Teacher Quality Institute, *Professional Learning* (Web Page) <<https://www.tqi.act.edu.au/professional-learning>>; Teacher Registration Board of Western Australia, *Professional Learning* (Web Page) <<https://www.trb.wa.gov.au/Teacher-Registration/Currently-registered-teachers/Renewal-of-registration/Professional-learning>>.

6.6 CONCLUDING REMARKS

The application of procedural fairness in the context of government schools is a contentious issue that principals deal with regularly. This study concluded that the NSW Department of Education secondary school principals who participated in this research did apply the rules of procedural fairness to an appropriate standard consistent with the administrative law principle of procedural fairness. How the NSW Department of Education applies the rules of procedural fairness holistically still remains to be examined. However, to minimise risk for the NSW Department of Education, a formalised training program should be developed for the hundreds of DELs, the 2,200 principals (1,800 primary and 400 secondary), the thousands of deputy principals and the thousands of head teachers and assistant principals to ensure a common standard of practice in the application of the rules of procedural fairness is being applied across the entire NSW Department of Education school system. If government departments of education cannot apply the rules of procedural fairness correctly, what chance does the private school sector have?

APPENDICES

APPENDIX A INTERVIEW SCHEDULE

Education Lawyer Questions

1. What areas of law are school principals involved with in the administration of NSW schools?
 - How often does it appear that principal's deal with legal issues?
 - Are some issues more recurrent than others?
 - What areas of law would be helpful for principals to know?
2. How do principals make decisions in accordance with the rules of procedural fairness?
 - Do they do this well?
 - If so, how and why? If not, what is happening?
3. What sorts of relevant cases* have you been involved in as an education lawyer working for the Department of Education NSW? (**All reference to parties will be removed and the lawyer will be requested to say 'in the case of X student or by his tutor Y' against the Department of Education.*)
4. What has been the outcome of these cases? Mediation, settled, litigation, etc?
5. What types of advice and in what form do you provide to principals or the Department of Education?
6. Do you think principals need more assistance/training in legal issues to perform their job?
 - If so, what would you recommend and why?
7. Where do school principals get their legal knowledge from? (Circulars, policy, in-service training, education law notes, etc).
8. Is there anything else that you can think of that would be of assistance in the development of education law training for school administrators?

Secondary Government School Principals Questions

1. Can you please outline your roles and responsibilities as a secondary government school principal?
2. What areas of law are you the principal involved with in the administration of NSW secondary schools?
3. What knowledge do you have of the rules of procedural fairness as a principal that affects your decision-making?
4. Where do you as the principal gain your legal knowledge of law as applied in your decision-making?
5. How do you as the principal recognise that a legal problem is developing or exists in your school?
6. Do school-based legal problems create difficulty for you the principal? Please explain the antecedents to this difficulty and what you believe can be done to reduce the challenging process of applying procedural fairness to the decision-making processes.
7. What programs exist for principal legal training in the NSW around the rules of procedural fairness in decision-making?
 - a) Have you been involved in any of these legal training programs? If so, what types of programs/conferences/workshops have you been involved in?
8. Are you able to provide any examples of legal issues/decisions that you as the principal have been involved in specifically around student discipline, the provision of special education and industrial relations:
 - a) Who was involved
 - b) How were they involved
 - c) What legal instruments were consulted or used
 - d) What was the resolution process
 - e) What was the outcome

APPENDIX B

VIGNETTES

Case Study 1 – Student Discipline Example

- Four students are alleged to have smoked cannabis on the school oval by other students who witnessed these four students.
- No teachers were present.
- Three of the students are to sit the final HSC exams in one weeks' time
- One student is in the A grade rugby team which has the final on Saturday
- Are you able to outline the processes that you undertake in your decision-making?

Case Study 1A – Student Discipline Example

- Four students are alleged to have been organizing a fight club behind the demountable classroom and students have been fighting.
- Two students come forward and advise you of the situation.
- No teachers were present.
- Three of the students are to sit the final HSC exams in one weeks' time
- One student is in the A grade sports team which has the final on Saturday
- Are you able to outline the processes that you undertake in your decision-making?

Case Study 2 – Special Education

- A parent and student presents at your school who suffers from learning disabilities and Asperger's syndrome.
- Are you able to outline the processes that you undertake in your decision-making when enrolling and providing for the education of the student?

Case Study 3 – Industrial Relations

- A staff member is accused of having a sexual relationship over the past two months with a student at your school who is 16 years of age.
- It is the students' word against the teachers.
- Are you able to outline the processes that you undertake in your decision-making?

APPENDIX C

LIST OF LEGAL ISSUES BULLETINS AS PUBLISHED BY THE NEW SOUTH WALES

DEPARTMENT OF EDUCATION LEGAL DIRECTORATE

[Bulletin 2 - Offensive behaviour on or near departmental premises](#)

[Bulletin 3 - Procedural fairness in the Department of Education](#)

[Bulletin 4 - Use and disclosure of personal information](#)

[Bulletin 5 - Student discipline in government schools](#)

[Bulletin 6 - Power to search students](#)

[Bulletin 8 - Claims for loss of or damage to personal property and use of private motor vehicles by staff, parents and students](#)

[Bulletin 9 - Physical restraint of students](#)

[Bulletin 13 - Interviews of students and staff by police and officers from Community Services in schools](#)

[Bulletin 15 - Fireworks displays in school premises](#)

[Bulletin 18 - Staff giving evidence in courts and tribunals](#)

[Bulletin 19 - Liability and rights of staff in relation to serious incidents which involve potential risk of injury to persons on departmental premises](#)

[Bulletin 20 - Changing the way a student name is used and recorded by schools](#)

[Bulletin 22 - Possession of knives - issues for schools](#)

[Bulletin 23 - Protected confidences - school counsellors and records of victims of sexual assault](#)

[Bulletin 24 - Use of cars at work](#)

[Bulletin 25 - Subpoenas](#)

[Bulletin 27 - Assault, harassment, stalking and intimidation of students and staff at school](#)

[Bulletin 29 - Insurance for voluntary workers in schools](#)

[Bulletin 30 - Correction of children and the law](#)

[Bulletin 32 - Age of consent and related sexual offences](#)

[Bulletin 33 - Difficult interviews and related issues](#)

[Bulletin 34 - Defamation](#)

[Bulletin 35 - Misuse of technology in schools](#)

[Bulletin 36 - Conducting fundraising activities](#)

[Bulletin 37 - Occupational Health and Safety Act 2000](#)

[Bulletin 38 - Offender Prohibition Orders and the school](#)

[Bulletin 39 - Preparation and use of accident reports in school](#)

[Bulletin 40 - Information about students with a history of violence](#)

[Bulletin 41 - The use of closed circuit cameras \(CCTV\)](#)

[Bulletin 42 - Staff subject to cyber bullying](#)

[Bulletin 43 - Enrolment of students in government schools](#)

[Bulletin 44 - Apprehended Violence Orders - AVOs](#)

[Bulletin 45 - Sexual procurement and grooming of children](#)

[Bulletin 46 - Health care procedures and medical emergencies in schools](#)

[Bulletin 47 - Requests for information from other government agencies](#)

[Bulletin 48 - Role of Legal Services](#)

[Bulletin 49 - Hiring a contractor or an employee](#)

[Bulletin 50 - Exchanging information with other organisations - the Care and Protection Act](#)

[Bulletin 51 - School counsellors and confidentiality](#)

[Bulletin 52 - Students at risk of anaphylaxis](#)

[Bulletin 53 - Students under 18 living independently](#)

[Bulletin 55 - Transgender students in schools](#)

[Bulletin 56 - Confiscation of student property](#)

[Bulletin 57 - Responding to anti-social and extremist behaviour](#)

[Bulletin 58 - Unauthorised entry onto departmental premises](#)

[Bulletin 59 - Duty to report and duty to protect a child from child abuse](#)

APPENDIX D

UNIVERSITY ETHICS APPROVALS



19 Moust Street (PO Box 1225) Fremantle WA 6059
+61 8 9433 0555 | enquiries@nd.edu.au

16 August 2017

Professor Joan Squelch & Mr Tryon Francis
School of Law
The University of Notre Dame Australia
Fremantle Campus

Dear Joan and Tryon,

Reference Number: 017126F

Project Title: "Procedural Fairness Requirements in Decision-Making: Legal Issues and Challenges for Public Secondary School Principals in New South Wales."

Your response to the conditions imposed by a sub-committee of the university's Human Research Ethics Committee, has been reviewed and assessed as meeting all the requirements as outlined in the *National Statement on Ethical Conduct in Human Research* (2007, updated May 2015). I am pleased to advise that ethical clearance has been granted for this proposed study.

Other researchers identified as working on this project are:

Name	School/Centre	Role
A/Prof Kevin Watson	School of Education Sydney	Co-Supervisor

All research projects are approved subject to standard conditions of approval. Please read the attached document for details of these conditions.

On behalf of the Human Research Ethics Committee, I wish you well with your study.

Yours sincerely,



Dr Natalie Giles
Research Ethics Officer
Research Office

cc: Prof Doug Hodgson, Dean, School of Law

Broomie Campus 88 Guy Street (PO Box 2287) Broomie WA 6725
Sydney Campus 140 Broadway (PO Box 944) NSW 2007

Fremantle

Broomie

Sydney

ABN 69 330 643 210 | CRICOS Provider Code: 01032F

nd.edu.au



Research & Innovation
Building 1, Level 14
PO Box 123 Broadway
NSW 2007 Australia
T: +61 2 9514 9681
F: +61 2 9514 1244
www.uts.edu.au

UTS CRICOS PROVIDER CODE 00969F

11 April 2013

A/Prof Sally Varnham
Law
CM05B.02.14
UNIVERSITY OF TECHNOLOGY, SYDNEY

Dear Sally,

UTS HREC 2013000177 – Associate Professor Sally Varnham, Ms Tracey Booth (for Mr Tryon Francis, PhD student) – “School Principals make legal decisions on a daily basis but how equipped are they to deal with the legal issues which confront them?”

Thank you for your response to the Committee's comments for your project titled, "School Principals make legal decisions on a daily basis but how equipped are they to deal with the legal issues which confront them?". Your response satisfactorily addresses the concerns and questions raised by the Committee who agreed that the application now meets the requirements of the NHMRC National Statement on Ethical Conduct in Human Research (2007). I am pleased to inform you that ethics approval is now granted.

Your approval number is UTS HREC REF NO. 2013000177

Please note that the ethical conduct of research is an on-going process. The *National Statement on Ethical Conduct in Research Involving Humans* requires us to obtain a report about the progress of the research, and in particular about any changes to the research which may have ethical implications. This report form must be completed at least annually, and at the end of the project (if it takes more than a year). The Ethics Secretariat will contact you when it is time to complete your first report.

I also refer you to the AVCC guidelines relating to the storage of data, which require that data be kept for a minimum of 5 years after publication of research. However, in NSW, longer retention requirements are required for research on human subjects with potential long-term effects, research with long-term environmental effects, or research considered of national or international significance, importance, or controversy. If the data from this research project falls into one of these categories, contact University Records for advice on long-term retention.

If you have any queries about your ethics clearance, or require any amendments to your research in the future, please do not hesitate to contact the Ethics Secretariat at the Research and Innovation Office, on 02 9514 9772.

Yours sincerely,

Professor Marion Haas
Chairperson
UTS Human Research Ethics Committee

APPENDIX E

NEW SOUTH WALES STATE EDUCATION RESEARCH APPLICATIONS PROCESS ETHICS

APPROVAL



Mr Tryon Francis

DOC13/274978
SERAP Number 2013075

Dear Mr Francis

I refer to your application to conduct a research project in NSW government schools entitled *School Principals make legal decisions on a daily basis but how equipped are they to deal with the legal issues which confront them?*. I am pleased to inform you that your application has been approved. You may contact principals of the nominated schools to seek their participation. **You should include a copy of this letter with the documents you send to schools.**

This approval will remain valid until 11/04/2014.

No researchers or research assistants have been screened to interact with or observe children for the purposes of this research.

I draw your attention to the following requirements for all researchers in NSW government schools:

- School principals have the right to withdraw the school from the study at any time. The approval of the principal for the specific method of gathering information must also be sought.
- The privacy of the school and the students is to be protected.
- The participation of teachers and students must be voluntary and must be at the school's convenience.
- Any proposal to publish the outcomes of the study should be discussed with the research approvals officer before publication proceeds.

When your study is completed please forward your report to: Manager, Quality Assurance Systems/Research, Department of Education and Communities, Locked Bag 53, Darlinghurst, NSW 1300.

You may also be asked to present on the findings of your research.

I wish you every success with your research.

Yours sincerely

A black rectangular redaction box covering the signature of Dr Susan Harriman.

Dr Susan Harriman
Leader, Quality Assurance Systems

22 July 2013

Policy, Planning and Reporting Directorate
NSW Department of Education and Communities
Level 1, 1 Oxford Street, Darlinghurst NSW 2010 – Locked Bag 53, Darlinghurst NSW 1300
Telephone: 02 9244 5060 – Email: serap@det.nsw.edu.au

Mr Tryon Francis
[Redacted]

DOC19/1052592
SERAP 2013075

Dear Mr Francis

I refer to your application for extension to the research project being conducted in NSW government schools entitled *School Principals make legal decisions on a daily basis but how equipped are they to deal with the legal issues which confront them?* I am pleased to inform you that your application for extension has been approved.

This extension approval will remain valid until 3 December 2020.

The following researchers or research assistants have fulfilled the Working with Children screening requirements to interact with or observe children for the purposes of this research for the period indicated:

Researcher name	WWCC	WWCC expires
Tryon Francis	[Redacted]	[Redacted]

When your study is completed please upload your report to SERAP online
<http://serap.det.nsw.edu.au>.

Yours sincerely

[Redacted Signature]

Dr Robert Stevens
Manager, Research
Strategic Analysis | CESE
3 December 2019



STRATEGIC ANALYSIS UNIT | CESE
NSW Department of Education
Level 9, 105 Phillip Street, Parramatta NSW 2150 | GPO Box 33, Sydney NSW 2001
Telephone: 7814 2547 – Email: det.serap@det.nsw.edu.au

APPENDIX F

PARTICIPANT INVITATION EMAIL AND LETTER



INVITATION EMAIL

Procedural Fairness Requirements in Decision-Making: Legal Issues and Challenges for Public Secondary School Principals in New South Wales

Dear NSW Department of Education School Principal/Lawyer,

My name is Mr Tryon Francis and I am a PhD candidate at The University of Notre Dame Australia.

I am conducting research on legal issues relating to school management in particular the application of the rules of procedural fairness (natural justice) in decision-making. The research seeks to gain a better understanding of the legal issues and associated decisions made by school principals on a daily basis, and how confident principals are to deal with the various legal matters. The data gathered will be used to develop academic and professional development training programs in the area of education law and policy.

This research is for completion of a Doctor of Philosophy in the School of Law at The University of Notre Dame Australia.

I am writing to request your assistance with this research. I would be grateful if you would accept an invitation to participate in this project given your current position and experience as a school principal/education lawyer. The research will involve an audio recorded face-to-face semi-structured interview with you and should take no more than 45 to 60 minutes of your time.

If you are interested in participating, I would be grateful if you would contact me on (02) 8204 4200 or tryon.francis@nd.edu.au. My supervisor is Professor Joan Squelch and she can be contacted on (08) 9433 0952 or joan.squelch@nd.edu.au

Yours sincerely,

[Redacted signature]

Mr Tryon Francis
PhD Candidate
School of Law
tryon.francis@nd.edu.au

APPENDIX G

PARTICIPANT INFORMATION SHEET



PARTICIPANT INFORMATION SHEET

Procedural Fairness Requirements in Decision-Making: Legal Issues and Challenges for Public Secondary School Principals in New South Wales

Dear NSW Department of Education School Principal/Lawyer,

You are invited to participate in the research project described below.

What is the project about?

This research is to identify the administrative law legal knowledge required of school principals in the decision-making processes in their role in NSW government secondary schools. The research aims to address the following primary research question:

To what extent are NSW government (public) secondary school principals equipped to make decisions that are consistent with the administrative law principles of procedural fairness, and how can this be improved by training?

Who is undertaking the project?

This project is being conducted by Tryon Francis and will form the basis for the degree of Doctor of Philosophy at The University of Notre Dame Australia, under the supervision of Professor Joan Squelch.

What will I be asked to do?

If you consent to take part in this research study, it is important that you understand the purpose of the study and the tasks you will be asked to complete. Please make sure that you ask any questions you may have, and that all your questions have been answered to your satisfaction before you agree to participate.

The project involves participants partaking in a semi-structured audio recorded interview of approximately 45-60 minutes. Post interview, you may be requested to read over the final transcript. The purpose of the interview is to ask questions on legal issues you have had to decide on or have been involved in as a school administrator. The location of the study is ideally at your school/directorate/firm to avoid any inconvenience and cost to you associated with your involvement with this research. However, the interview can also be determined at a mutually convenient location.

Are there any risks associated with participating in this project?

There are no foreseeable risks in participating in this project. However, if you do not feel comfortable answering any questions or continuing with the interview you may withdraw at any stage from the interview and project. Your name and the name of the school will not be disclosed to any party except the researcher and principal supervisor.

What are the benefits of the research project?

The benefits of the research is to identify the role administrative law (procedural fairness) has in the decision-making of NSW government secondary school principals. From this information, a set of recommendations will be provided for the design and development of an education law program specifically addressing the components of administrative law (procedural fairness) as applicable to government school principal's decision-making.

What if I change my mind?

Participation in this study is completely voluntary. Even if you agree to participate, you can withdraw from the study at any time. If you withdraw, all information you have provided will be destroyed.

Will anyone else know the results of the project?

Information gathered about you will be held in strict confidence. A transcription service may be used to transcribe the audio interview, however, only non-identifiable data will be sent to a transcription service. This confidence will only be broken if required by law. Identifiable data will be secured in a locked office and all electronic data will be stored on a password protected external hard-drive located in a safe in the researcher's office. No participant or school description will be identifiable in any publication. Once the study is completed, the data collected from you will be de-identified and stored securely in the School of Law at The University of Notre Dame Australia for at least a period of five years. The data may be used in future research but you will not be able to be identified. The results of the study will be published as conference proceedings, journal articles, a PhD thesis and book chapters.

Will I be able to find out the results of the project?

Once we have analysed the information from this study we will disseminate the findings by conference proceedings, PhD thesis and journal articles a summary of our findings. You can expect to receive this feedback in 2021.

Who do I contact if I have questions about the project?

If you have any questions about this project please feel free to contact either myself tryon.francis@nd.edu.au or (02) 8204 4200 or my supervisor, Professor Joan Squelch joan.squelch@nd.edu.au or (08) 9433 0952. My supervisor and I are happy to discuss with you any concerns you may have about this study.

What if I have a concern or complaint?


The study has been approved by the Human Research Ethics Committee at The University of Notre Dame Australia (approval number 017126F) and the State Education Research Application Process (SERAP 2013075). If you have a concern or complaint regarding the ethical conduct of this research project and would like to speak to an independent person, please contact Notre Dame's Ethics Officer at (+61 8) 9433 0943 or research@nd.edu.au. Any complaint or concern will be treated in confidence and fully investigated. You will be informed of the outcome.

How do I sign up to participate?

If you are happy to participate, please sign both copies of the consent form, keep one for yourself and hand the other to me

Thank you for your time. This sheet is for you to keep.

Yours sincerely,


Mr Tryon Francis
PhD Candidate
School of Law
The University of Notre Dame Australia

APPENDIX H

PARTICIPANT CONSENT FORM



CONSENT FORM

Procedural Fairness Requirements in Decision-Making: Legal Issues and Challenges for Public Secondary School Principals in New South Wales

- I agree to take part in this research project.
- I have read the Participant Information Sheet provided and been given a full explanation of the purpose of this study, the procedures involved and of what is expected of me.
- I understand that I will be interviewed and that the interview will be audio recorded.
- The researcher has answered all my questions and has explained possible problems that may arise as a result of my participation in this study.
- I understand that I may withdraw from participating in the project at any time without prejudice.
- I understand that all information provided by me is treated as confidential and will not be released by the researcher to a third party unless required to do so by law.
- I agree that any research data gathered for the study may be published provided my name or other identifying information is not disclosed.
- I understand that research data gathered may be used for future research but my name and other identifying information will be removed.

Name of participant			
Signature of participant		Date	

- I confirm that I have provided the Information Sheet concerning this research project to the above participant, explained what participating involves and have answered all questions asked of me.

Signature of Researcher	[REDACTED]	Date	
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