



The Association of Independent Schools
of New South Wales Limited ACN 003 509 073 ABN 96 003 509 073

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6 June 2005

Mr John Weeks
Headmaster
Knox Grammar School
PO Box 5008
WAHROONGA NSW 2076

Dear Mr Weeks

INVESTIGATION REVIEW – REDACTED

As requested, I have reviewed the documentation you forwarded to me, regarding an allegation made against Mr REDACTED by a student / boarder of the school, REDACT and the investigation of this allegation.

The following documents were provided to me:

- Handwritten notes, apparently of an interview with Yooie Choi, on 16.5.05
- Unsigned, undated typed single page headed 'Statement' (apparently REDACT's statement)
- Handwritten notes, apparently of an interview with REDACT, on 17.5.05
- Handwritten notes, apparently of an interview with REDACTED on 17.5.05
- Single page, address for Mr and Mrs RE
- Email from REDACTED to John Weeks and Martin Gooding dated 19.5.05
- Email from REDACTED to Martin Gooding on 23.5.05 attaching an email dated 4.5.05 from RE REDACT to Parents
- Letter from Martin Gooding to REDACTED dated 23.5.05
- Letter from Martin Gooding to Mr and Mrs RE dated 23.5.05
- Letter from Martin Gooding to REDACT dated 23.5.05
- Letter from Martin Gooding to Yooie Choi dated 23.5.05
- Complaints register notification, undated and unsigned.

Comments:

1. I have analysed the documents provided to me and am unaware of any other documents.
2. The exact chain of events is difficult to ascertain. However, it appears that sometime after midnight on Saturday 7 May, physical contact with REDACT (a young person, apparently from Gillespie House and thus, presumably under 18) was initiated by REDACTED (a current employee of Knox). REDACT spoke by telephone with his father and then contacted police regarding an alleged assault by Mr REDACTED. Police interviewed RED and Mr REDACTED and

decided not to act further, unless REDACT wanted to take it further. Yooie Choi became aware of incident on Monday 9 May when REDACT indicated he had been 'choked / manhandled' by Mr REDACT. Mr Choi 'thought about obligations regarding child protection / sought advice'.

3. *It is not clear from whom and when Mr Choi sought advice. He was correct in thinking about child protection obligations. The Ombudsman Act 1974, as amended, in brief defines 'reportable conduct' as having three elements: a current employee, conduct that falls within the definition of reportable conduct, a child under 18 at the time of the alleged conduct (there is no requirement that the child be a student of the school). The Act places 'assault' within the definition of reportable conduct. Physical assault has three elements: an act on or towards a child and either the application of force or an act that causes a child to think that immediate force will be used on them and that the act is either hostile or reckless. The Head of Agency is required to report allegations of reportable conduct to the Ombudsman within 30 days of becoming aware of them. This decision to report is made on the face value of the allegation, not after investigation. The allegation made by REDACTE was clearly one of reportable conduct. (refer Chapter 3, NSW Ombudsman Child Protection in the Workplace, 2004.)*
4. *Once an allegation of 'reportable conduct' is made it must be investigated under a protocol that provides for procedural fairness. The current protocol for AIS schools is 'The Association of Independent Schools N.S.W. and The NSW/ACT Independent Education Union recommended Protocols for Investigative and Disciplinary Proceedings – 2001 (The Protocols)'. It is not clear whether this protocol was used in this matter.*
5. *Mr Choi apparently spoke with Mr Gooding on 13.5.05 and then Mr Gooding appears to have interviewed some people. The Protocols require that an allegation is clarified and then formally provided to the subject of the allegation for response. It is not clear that this occurred. This may have occurred in the interview Mr Gooding conducted with Mr REDACT but without a record that shows questions and answers I cannot ascertain whether this occurred. In any event, Mr REDACT should have been provided with the allegation in advance of any such interview.*
6. *It is of concern given the allegation made by REDACT to Mr Choi on 9.5.05 that he had been 'choked/manhandled' and in the undated statement 'strangled from behind' that Mr REDACTE was able to speak with REDACT on the Tuesday and Wednesday (the dates in Mr REDACT's email do not appear to be correct) before Mr REDACT was advised of an investigation. The potential for REDACT's evidence to be coloured by this contact could have been avoided had the investigation been initiated on Monday 9 May with appropriate advice to Mr REDACT ie. not to speak with REDACT. (The sequence of events in the Complaints register notification are not clear because they are not dated but it appears that Mr REDACT may have spoken with REDACT after he REDACT had spoken with the Headmaster ('the following Tuesday' – which Tuesday?) . If this is the case, REDACT's action would seem to be inappropriate.*
7. *From the Complaints register notification, it appears that a finding was made that physical contact occurred but there was disparity between the two parties as to what this entailed. I note REDACTE's apparent evidence that he was choked or strangled from behind and Mr REDACT's apparent evidence by email of frontal contact without excessive force. It is not clear whether other persons in the vicinity were interviewed to ascertain whether or not they could corroborate either version of events. I have already noted concern about Mr REDACT's talking with REDACT and note Mr REDACT's indication that no disciplinary action should be taken against REDACT. I assume that appropriate consideration has been given to the pressure that may have been placed on REDACT by being questioned by police, speaking with Mr REDACT speaking with Mrs REDACT, Mr REDACT speaking with REDACT's parent/s in the early hours of the*

morning at the time of the alleged incident and RED perhaps being concerned that he could be in trouble for 'drinking'. I also assume that appropriate consideration has been given to Mr REDAC's physical interaction with the student, given that it appears Mr REDAC may have been aware of the likelihood of students being in the street. A verbal challenge, suitably identifying himself, may have avoided any need for physical contact.

8. The Protocol provides six findings. It is not clear whether the finding made was finding three (misconceived); finding five (not reportable conduct but might constitute a breach of professional behaviour or judgement) or finding six (sustained and required disciplinary action). Any of these three findings based on what I have seen could be possible.
9. It is not clear whether Mr Gooding's letter dated 23 May to Mr REDAC was to advise him of a preliminary finding and proposed action or a final finding and action. The former is required by the protocol.
10. **I believe that the full details of this investigation with further explanation and clarification where necessary should be provided to the Ombudsman unless you as Head of Agency have determined that this matter was to be dealt with under the Class or Kind Agreement, for which I believe Mr Gooding is an accredited investigator. If the latter is the case, the file should be fully documented and securely stored, with the appropriate notification being forwarded to AIS. Depending on the Finding, consideration may also need to given to whether notification to the Commission for Children and Young People is required.**
11. On another note, whilst I can understand the school wanting to distance itself from parties organised by others, it seems to me that a 'duty of care' may still exist and be established by the knowledge that students (particularly boarding students) are taking part; the email from the Head of Ewan House to Parents; the knowledge of the Head of Boarding about this party and previous parties; and the engagement of the school's security service to attend the point where buses are to return. I provide further information about duty of care below and note that you have a number of staff attending the 'Duty of Care, Liabilities and Indemnities' seminars that the AIS are currently presenting. The advice provided in the seminars may assist you in managing the 'parties' situation.

What duty of care does a school owe its students?

12. In Australia, a person owes a duty of care to others to not cause injury as a result of their negligent act or omission. This duty does not normally extend to taking positive steps to prevent an injury to another person.
13. The nature of the duty as it applies in New South Wales has now been set out in legislation. The *Civil Liability Act 2002* ('**Civil Liability Act**') applies in relation to any claim for damages for personal injury, death, damage to property or economic loss resulting from negligence. The Civil Liability Act provides that a person is not negligent in failing to take precautions against a risk of harm unless:
 - i. the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); **and**
 - ii. the risk was not insignificant; **and**

iii. in the circumstances, a reasonable person in the same position would have taken those precautions.

14. However, the law also imposes a special duty on certain categories of relationships, giving rise to more onerous duties. The relationship between a school and its pupils is one such relationship. A school has a duty to *ensure* that reasonable steps are taken to prevent harm to students. This is a positive duty - that is, it requires that positive steps be taken.

I hope this review is useful to you.

Please contact me if I can be of further assistance.

Yours faithfully,

Grahame Wilson
Assistant Director, Employment Relations