Search and Seizure in Public Schools

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The question whether schools have powers of search in relation to students and their property is not yet settled in New Zealand law. Although there has been media attention given to particular search and seizure incidents over the years, these incidents have not led to litigation (save in one case from 1994 which was settled before trial).[1] Accordingly, while various views have been expressed in public on the topic,[2] the matter has not been before a court for judicial decision. Hence there is considerable uncertainty. The aim of this paper is to present a view as to the law about searches and seizures in schools. I hope that this journey into uncharted waters, and any responses it engenders (either from those present at this seminar or in subsequent written papers) will assist to bring some clarity to the area.

One introductory comment is necessary. I am conscious that as a lawyer I come to the topic from outside the world of school teachers and their problems in maintaining discipline at schools. It is, however, the nature of law that it falls into the domain of lawyers and judges. A judicial decision in this area must of course be informed by what happens in schools and the problems that schools face. But whether teachers have powers to search is ultimately a legal question, and it must be decided on the basis of legal principle and not pragmatics.

This paper proceeds as follows. In Part 1, I set out more fully the problem to which the paper seeks an answer. Then in Part 2 I will describe some of the background reasons why

1 The notorious incidents are those which occurred at Hastings Boys High School in 1991 and at Otahuhu College in 1994. The former led to a report by the Commissioner for Children conveniently reported in the style of a legal judgment as *Re Strip Search at Hastings Boys High School* [1990-1992] NZBORR 480. It was the latter which led to the litigation referred to in the text. But other incidents have surfaced from time to time: use of drug sniffer dogs is one example.

2 The other commentators to which I am referring are: first, the Youth Law Project who express views on this topic in their pamphlets and in other places (eg " Searches and Confiscations at Schools", updated pamphlet, October 1994, and "Students retain the right to refuse a search by staff", Sunday Star Times, July 19, 1994, p C11) and the Auckland District Law Society Public Issues Committee which published a paper on the topic in 1991 in relation to the Hastings Boys' High School incident, dated July 18, 1991. In addition, there is the Commissioner for Children's Report (see note 1, above). But in the absence of any comprehensive, or indeed any, text book on education law in this country there has been little or no reason for the subject of searches to be explored save in reaction to one of the incidents which has occurred.

I believe the school search problem presents difficulty. This sets the scene for the detailed examination in Part 3 of the legal basis of schools' powers of search. This third and final part deals with the Education Act 1989 (which in my view confers the power to search) and the New Zealand Bill of Rights Act 1990 (which limits and controls that power). I should emphasise again that the law is not settled, and that the following represents my view of what the law is. Though I believe it to be correct, schools will need to reach their own views with the assistance of their advisers. There is another reason why schools will need to obtain their own advice: the subject of school searches is a large one, and I have had to confine this paper to general principles in order to keep it to a reasonable length. Amongst the issues not dealt with, for example, are the powers to undertake random or "blanket" searches where there is no individualised suspicion, as would be the case when drug sniffer dogs are used.

PART 1

THE NATURE OF THE PROBLEM

A student is seen in an examination to be copying from a piece of paper which she folds up and puts in her pocket as she leaves. May the supervising teacher require that she reveal what she has in her pockets? May the teacher take the piece of paper which is revealed?

A group of students at a school camp are seen to come out of nearby bushes, acting suspiciously. They smell of alcohol. One has a bag. May the teacher demand to see inside the bag?

A radio has been reported stolen in school. In the cloakroom one coat is observed to have a heavy square item in a pocket, corresponding in size to the missing radio. May a teacher look into the pocket?

An anonymous parent calls the school and says that a named student is selling drugs and that he keeps those drugs in his locker. May the school search the locker? Must they ask the student? What if she says no?

Countless other scenarios can be imagined. The question which this paper explores is whether there is a legal entitlement for teachers and principals to undertake searches of students and their property in schools. This involves some preliminary questions such as what the definition of a "search" is. We begin there.

1 The meaning of search and seizure

Richardson J put it simply in the leading criminal case of *R v Jefferies*, "search is an examination of a person or property and a seizure is a taking of what is discovered."[3] But

3 [1994] 1 NZLR 290, 300 (CA).

a further qualification is required: the term "search" does not ordinarily connote mere "looking"; nor does "seizure" connote mere "gathering".[4] The teacher who watches a student handling illicit drugs, for example, does not perpetrate a search; nor does the teacher who picks up illicit material from the floor make a seizure. Rather, these terms are employed in the law to describe examinations or takings in which the legally protected rights of another person are invaded in some way.

This is not a controversial qualification. A person's conduct in public, or even in private where he or she can be seen by those lawfully present, is obviously exposed to the gaze of others. The "examination" which occurs when observers look at that person cannot be called a search, because there is no right "not to be seen". Similarly, material discarded or abandoned, such that no property rights are asserted, is available for taking without "seizure".[5]

Hence, in legal parlance the law of search and seizure is the law as to when and how one's rights to property or bodily integrity may be invaded by another person claiming a legal entitlement to do so. The vast bulk of the law about search and seizure arises out of criminal investigations in which the police enter private property without consent to carry out the search, or search a person without consent. There are, as I say, no cases in New Zealand where the question has arisen as between teacher and student.

A crucial second point about the definition of searches is this. The term "search" often suggests to non-lawyers a forcible examination of unwilling students, and conjures up images of "frisks" and strip searches. As shall be seen, however, searches of this type are generally likely to be unlawful. But it is no less a search if a teacher requests a student to, say, reveal what is in her hand, turn out her pockets, or remove a jacket or shoes for inspection. I suspect that this latter scenario is much more common in schools. And, as we shall see, my view is that, assuming the other features of a reasonable search are present, searches of this type may be lawfully conducted.

2 How the legal question arises

How might the search issue arise in schools? Potentially it might arise in one of three ways.

First, and this is how the issue commonly arises in the United States, a search perpetrated by a school principal on a student or her property might reveal evidence of a criminal offence – typically misuse of drugs or possession of illegal weapons. If the student is subsequently charged by police with a crime, she may argue as part of her defence that the search was illegal and in breach of the Bill of Rights. If successful, the next step in the argument is that incriminating evidence should be excluded as a result. In most cases this

4 The border line between looking and searching may on occasions be hard to draw: see *R v Dodgson*, CA 441/95, 14 December 1995 (constable crouching to examine front of car under torchlight was looking not searching).

5 See *R v Reuben* [1995] 3 NZLR 165; and comments by Optican in "Search and Seizure: An Update on s 21 of the Bill of Rights" [1996] NZ Law Rev (forthcoming).

argument, if successful at both stages, will result in an acquittal. This is, therefore, to use the alleged illegality of the search as a "shield" with which to resist conviction. In such a case the school is not a party, although the teacher may be a witness. Nevertheless the court will be required to adjudicate upon whether the search was legally empowered and reasonably carried out.

Second, a student who is searched by a school teacher or principal but who is not subsequently charged with a criminal offence may commence a civil action against the teacher and the school.[6] It would be an action for trespass to the person or to goods. Here the legality and reasonableness of the search will once again be central to the students' case. This time the alleged illegality is used as a sword with which to seek compensation. The school will be a party to this litigation. The one New Zealand case of which I am aware began this way – the Otahuhu College strip-search incident in 1994 – but because the case was settled the merits of the legal dispute never came to be determined by a judge. This type of case could arise out of any type of search, whether or not the purpose is to seek evidence of a criminal activity. Though the context will be different, searches for items which indicate breaches of school rules, such as no smoking rules, will fall to be justified on similar principles.

A third scenario in which the legality of school searches might conceivably arise is the case where disciplinary action is taken by the school against a student as a result of what is found, or perhaps even for refusal to cooperate by allowing himself to be searched. Here it might be argued that if the school had no power to conduct a search, nor to require the student's cooperation, then no sanction can be applied to punish the student for what was found in the search, nor for any failure to cooperate. If the disciplinary action is challenged, a court may have to adjudicate on whether the legal power to search exists.

These, then, are possible ways in which the search issue may arise for authoritative legal determination. Short of this, a particular search incident may perhaps lead to legal commentary in which lawyers or others express their views – one such example is the Commissioner for Children's inquiry into the strip search at Hastings Boys' High School. The Commissioner's opinion on that incident was plainly a carefully researched piece of work.[7] It reaches, I am happy to say, conclusions which are broadly consistent with my own. But because that was an inquiry into a particular incident it dealt only with such legal issues as were required to express a view on the particular facts. In this paper I am seeking to go further and express a general view about the legal principles which should govern school searches.

3 The legal responses to date on search and seizure in schools

Legal commentators who have expressed a view on the legality of school searches fall into two principal camps.

6 It is possible that a student who is convicted could also sue the school for an allegedly illegal or unreasonable search. But this type of case is much less likely.

7 See above, note 1.

First, there is the view that the law confers no power of search on schools or teachers. One can point to the absence of any express powers of search in the Education Acts. This is to be contrasted with search powers in the general law which are either to be found clearly expressed in legislation or in well-established common law principles as to which there is no disagreement.[8] Persons in this camp will point out that students ought to enjoy the full panoply of rights provided by the general law of trespass and, as well, the statutory rights to be found in the New Zealand Bill of Rights Act 1990. Against this background, it is said, there is no justification for concluding that students may be searched. Just as a school principal may not search any member of the public (because he or she plainly has no power to invade their rights without legal authority) so too he or she may not search a student.[9]

Further, those taking this view might point out, correctly, that the right in s 21 of the Bill of Rights – not to be unreasonably searched – cannot be turned on its head so as positively to authorise reasonable searches. A Bill of Rights has no such effect: its purpose is to limit the powers of the state, not to create more.

There is an appealing simplicity and a certain logic to this first view. It is allied with the notion of "consent". It is said that teachers ought to request permission for searches. If consent is given any search that takes place will not amount to a violation of a legally protected right, since consent is a defence to actions for trespass to the person or to goods. In this way "consent" becomes extremely important, and the assumption is made that students may give a valid consent (at least if of sufficient maturity). To deal with the fact that students are minors whose capacity to give valid consent is doubtful, the English case of *Gillick v West Norfolk and Wisbech Health Authority* [10] is invoked – a case in which the House of Lords held that minors may give a legally sufficient assent to medical treatments according to their level of maturity.

The second category of views on the school search issue is that there is an implied legal power for searches to be conducted. The power arises out of the Education Act and its system of compulsory education.[11] But the power is not unlimited. It is a power to conduct reasonable searches.

This second view then involves a number of related questions such as how one decides what is "reasonable", what sanctions may be applied for failure of a student to cooperate, the legal definition of what a "search" is, whether force may be used to perpetrate a search, and so on.

8 For example, the common law power of search incident to arrest, as in *Lindley v Rutter* [1981] 1 QB 128.

9 This view is clearly taken in publications of the Youth Law Project, eg "Searches and Confiscations at School", above, note 2. It is also the view preferred in the 1991 paper prepared by the Public Issues Committee of the Auckland District Law Society (July 18, 1991) although that paper also presents the alternative argument, which it does not favour, referred to in the text below.

10 [1986] AC 112 (HL).

11 This would appear to be the view of the Commissioner for Children, and it is certainly consistent with his overall finding in the Hastings incident. But the view is not fully developed in the report.

My view is that the second view is legally correct and is likely to be the conclusion of any court that examines this area. It is the view which is taken in Canada and the United States of America. Further, I venture to say that it is the view which corresponds to the reality in our schools, where I suspect reasonable searches have long taken place without incident or serious complaint, and where it is rather unrealistic to describe students as having "consented" when they are requested to submit to searches of their property by those in authority. It is, therefore, a form of this second view that I develop in Part 3 of this paper. But next I want to examine the general background against which the issue of school searches must be considered, because I believe it helps to orient us to the problem.

PART 2

THE CONTEXT OF THE PROBLEM

Questions surrounding school searches are not only legally difficult but, at times, also emotive because they involve the rights of a vulnerable section of our community. It helps, I think, to consider the context in which the school search problem arises.

1 The ambiguity of the school environment

As American political philosopher Michael Walzer has said, "schools fill an intermediate space between family and society, and ... an intermediate space between infancy and adulthood."[12] Students are consigned for large parts of their young lives into the care of schools which are charged with the task of formally educating them. They are a mediating institution between home and state. School is the beginning of a process in which a child is exposed to wider influences than merely the family. During those school years the child will grow to maturity. This makes for a certain ambiguity: are schools properly conceived as an extension of the family or of the state? Are we to see them as caring institutions which should be solicitous for the educational welfare of our children, or as a potential antagonist?

I believe our basic orientation has to be that they are the former. Seen in this light, the possession by schools of power to search needs to be seen as an aspect of their educational and care-giving functions. If schools are seen as the enemy, one begins at the wrong point and may end up, I suggest, at the wrong answer. This is not to deny that the position of power which teachers occupy might be used to perpetrate unfair and unjust acts, including searches. But fear of the potential for unfairness need not be the driving force in exploring legal issues surrounding school search powers. Prohibition of the *unreasonable* search, while allowing the reasonable search, would seem in principle to balance the competing interests. At the least, one ought not to foreclose that possibility at the outset.

12 *Spheres of Justice* (1983), 198.

2 The development of a rights consciousness in New Zealand

The climate in which schools operate is rapidly changing. The enactment of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, along with the growth of various other "rights claims" advanced by groups within society, has contributed to a climate in which rights are assuming a higher profile than in the past. The creation of codes of rights is increasingly seen as a solution for perceived failings of our public institutions. In many respects, of course, this emphasis can be positive and produce worthwhile changes. But I sometimes wonder if the tendency to see everything in terms of "rights" does not dilute the potency of the concept. At the very least, the more rights there are then the more likely it is that some rights will have to give way to accommodate others. In the school context, for example, the rights of the majority to a first rate and drug-free education might depend in part on how much potency we ascribe to the "right" of a small number of students to be free of searches. In other words, it may not always help to think in terms of rights – not, at least, without recognising that they are not absolute. One of the unforeseen aspects of the New Zealand Bill of Rights Act 1990 has been that, because it states rights in absolute terms, it lends itself to being invoked – not always with merit – in controversies to which on more careful analysis it may not be relevant: the invasion of rights may be no more than a "reasonable limit" within s 5 of the Act.[13] So, in the present context, while the right to be free of "unreasonable searches" can be uttered as a powerful slogan, it must not be forgotten that it necessarily implies that *reasonable* searches are not out of the question.[14]

The emphasis on rights in the 1990s will assuredly bring the search issue before the courts before long. It is not surprising, for example, that the 1994 strip search at Otahuhu College led to litigation while previous incidents such as the Hastings Boys' High School event in 1991 did not. Things are changing fast.

3 Student rights or adult rights?

Another pivotal issue is how the rights of students in schools are to be conceived. It is sometimes said, rightly, that the Bill of Rights applies to all citizens and residents of New Zealand. It applies therefore to children as much as to adults. Indeed, there is no textual basis in the Bill of Rights for any other conclusion.

In this context the famous phrase from the important United States Supreme Court case *Tinker v Des Moines Independent Community School District* is often invoked:[15]

13 Section 5 reads: "Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." For comment on how the structure of the Bill of Rights and certain judicial approaches to its application encourages unnecessary concentration on rights in their absolute form, without consideration of whether there are reasonable limitations in terms of s 5, see my "How Does the Bill of Rights Work?" [1992] NZ Recent Law Rev 189.

14 Of course I am aware that the Bill of Rights cannot itself authorise a reasonable search. But, as is made clear in Part 3, it will permit the power which is conferred in the Education Act to be exercised reasonably.

15 393 US 503, 506; 21 L Ed 2d 731, 737 (1969).

> It can hardly be argued that either teachers or students shed their constitutional rights to freedom of speech or expression at the school house gate.

If this view animates one's approach to the school search issue then it might be thought to militate against a power of search, or at least to require that such powers as exist must be exercised only in the same way as search powers are invoked against the general adult population. Precisely this argument has been made, unsuccessfully as we shall see, in the United States: the law there is that searches may be perpetrated by schools upon their students without warrants and on a lesser standard than the generally applicable "probable cause" requirement.

The United States view when properly understood in fact manifests two important strains. First, that students do not shed their constitutional rights at the school gates but second, that those rights are necessarily tempered by the school environment. Indeed, the *Tinker* case simultaneously affirms the need for schools to have special powers:

> "[T]he court has repeatedly emphasised the need for affirming the comprehensive authority of the states, and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[16]

The very recent case of *Vernonia School District 47J v Acton* makes the same point:[17]

> Fourth amendment rights [ie rights against search and seizure], no less than First and Fourteenth amendment rights [free speech and equality], are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the school's custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases.

And earlier:[18]

> Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate", the nature of those rights is what is appropriate for children in school.

If we have this orientation to the legal issues here, as I believe we should, then it enables us to see that the New Zealand Bill of Rights Act 1990 will control school powers in a manner which may well be different from its impact on general police power. Different standards of reasonableness will apply in a school as between its teachers and students.[19]

16 Ibid, p 507;731.

17 515 US—; 132 L Ed 2d 564, 576 (1995).

18 Ibid, p 576.

19 This point is, I respectfully suggest, overlooked in the newspaper comment by Parker (sub nom Baker), "Students retain the right to refuse a search by staff", Sunday Star-Times, July 10. 1994, page C11, who says that if the Education Act were ever construed to authorise searches "such powers would still be subject to the Bill of Rights "reasonableness" test." That, of course, is true, but it must be recalled that "reasonableness" depends on context. It is not a fixed and uniform concept applying to every conceivable instance of search and seizure. Context is critical. See further below, in Part 3.

4 The problem for teachers

Teachers and their principals are at the front line of our schools. The conclusions which I reach, if correct, mean that they are not powerless to deal with matters of discipline involving the need to undertake some form of search. But it must be recalled that I am inquiring only into what the law would permit: it is for teachers and principals to decide whether they will use such powers as they have. Becoming embroiled in litigation, even if one is vindicated, is not pleasant. Particularly at a time when teachers feel underpaid and undervalued by society one can have sympathy for those who may feel the best policy is to keep their heads in the sand and not to confront students over discipline and behavioural problems which might involve obtaining of evidence through searches.

That said, the other side of the coin is that all parents of school children have a right to expect that an environment conducive to safe and productive education will be maintained in schools. The vast majority of students, those who cause no problems, have rights as well. The community is indebted to teachers and principals seeking to maintain drug and crime free schools. I am not suggesting that teachers ought to see themselves in some sort of alliance with the police in which it is their job to root out all crime: that is not the point of the power which I believe exists. It is a power which springs from the educational needs of students in schools.

5 Educating children in rights

It is important for children to be introduced in schools to the values that animate and underpin the life of the community. Rights of the type set out in the Bill of Rights and the Human Rights Act 1993 are rightly viewed as important. There is a place in schools for discussion of them, and obviously those principles, alongside other fundamental principles of humanity, should animate the school's own treatment of its pupils. But it by no means follows from this that no searches are possible in schools. The right in the Bill of Rights is to be free of unreasonable searches, not all searches. That is how it is in the wider community, and schools need not be seen any differently.

In light of these comments, I turn now to look at schools' powers of search in more detail.

PART 3

THE LEGAL POWERS OF SEARCH

1 What is meant by a "search"?

We have seen already that the term "search" is used in law to describe an invasion, in the quest for evidence, of the rights of another person which the law generally protects. A power to search means a power to undertake the search with corresponding immunity from suit by the person whose rights – to bodily integrity or to property – are invaded. It

could not be said, for example, that schools have any powers to search if searches may only be perpetrated with consent. No special legal power would be needed: anyone may search the person or property of another with their consent.

Further, as already stated, it is in my view no less a search if a person in authority demands that a student empty his or her pockets, or take off his shoes to reveal what may be inside. The invocation of authority so as to require that the subject *herself* produce material otherwise hidden is simply one way of conducting a search.[20] To me it does not assist to say that a student who complies with such a request is "consenting" to the search. Even if they are of maturity to appreciate that a refusal may be possible, the fact of the matter is that a "consent" is likely to be forthcoming because of the invocation of authority to which students in schools are expected to submit. In the approach to school searches I develop below the consent of students is not integral to the concept of a lawful search. In practice, of course, it will be reasonable to seek the student's cooperation.[21] But I believe the proper beginning point is to ask whether schools are entitled to search students even in the absence of their consent. This is especially so given that "consent" in the school environment is likely to be vitiated by coercion. I believe it makes more sense to concentrate on what teachers are lawfully permitted to *require* by way of searches, rather than allowing them carte blanche to do such searches as are "consented" to.

The view I take – that schools have a power to undertake some forms of search – requires me first to identify a legal power to do so. The question then becomes whether the Education Act supplies a power to search, and if so, what the nature of that power is.

2 The Education Act as a source of the power to search

The starting point, of course, is that no express powers of search are conferred by the Act. Indeed, the Act is brief and cryptic in its statement of school authority. Boards of Trustees have powers of "control and management".[22] Upon that edifice, and the associated empowerment of principals to carry out day to day management, hangs the ability of schools to govern all their affairs including staff and student matters.

I believe, however, that these words implicitly confer powers to undertake certain forms of search. These are my reasons.

(a) Compulsory education

The Education Act 1989 requires that every person between the ages of 6 and 16 must attend a registered school. It is true that this requirement can be fulfilled though enrolment

20 In the general law it has already been held that requests for documents can constitute searches: see *Adams on Criminal Law* Ch10.8.04(c) citing *NZ Stock Exchange v CIR* [1991] 4 All ER 443 (PC).

21 And in the case of personal searches, this cooperation may be necessary in practice to enable the search to be perpetrated without force, since force would render the search unreasonable. See further below.

22 Education Act 1989, ss 72, 75, and 76: see further below.

at private schools which are registered,[23] and that there are exemption mechanisms which permit home schooling.[24] But the principal point is that education is compulsory and the state provides an extensive network of schools for public education.

(b) Establishment of public schools

Public schools may be constituted under the Act in order to provide a forum for education. Such schools have a corresponding obligation to receive and educate children delivered into their tutelage. While the ability of schools to maintain enrolment schemes may lead to a certain amount of choice, and sometimes disappointment, in gaining entry to preferred schools, the bottom line is that public schools must take students seeking to attend.[25]

(c) Maintaining a proper educational environment

The duty to receive and educate children implies obligations to safeguard those children who are delivered into schools' care for substantial periods of the day. These obligations are imposed through a series of statutory provisions, and conceivably, common law actions for negligence.[26] Part VI of the 1989 Act headed "control and management of state schools" establishes a regime of locally elected Boards of Trustees empowered to run public schools in accordance with the legislation. Each school is to have a Charter, with a substantial component of the Charter being dictated by the Act itself. For example, each Charter is deemed to incorporate the aim of achieving, meeting and following the national education guidelines.[27] Those guidelines deal with "education goals" which are defined to mean desirable achievements; "national curriculum statements" meaning "areas of knowledge and understanding to be covered by students, skills to be developed; and desirable levels of knowledge, understanding and skill to be achieved by students".[28]

The school's performance in attaining the statutory obligations are enforced in a variety of ways, of which periodic inspection and review by the Education Review Office is a principal one. There are powers of entry and inspection conferred by s 78A. A school which is demonstrably failing in its task in education is exposed to sanctions such as the replacement of its Board by a Ministerial appointee (s 107).

It is, in my view, a corollary of the school's obligations to educate students entrusted to it that it has certain powers in relation to those students. I do not think this proposition is

23 Education Act 1989, s 35A.
24 Education Act 1989, s 26.
25 Education Act 1989, s 12.
26 I regard it as doubtful that an action could be maintained for negligent delivery of education at the suit of a person who claims their own education was defective by reason of its content. But there is at least the possibility of negligence (and exemplary damages) in relation to matters of safety of students, eg protection from known sources of danger such as other students or staff who were carrying out sexual assaults.
27 Education Act 1989, s 61.
28 Education Act 1989, s 60A.

seriously disputed. For example, certain powers of detention – at least during school hours – and other forms of coercion are taken for granted on a daily basis.[29] And lesser forms of discipline are taken for granted - the writing of lines and so on. All these involve powers of coercion, and if they are to have lawful effect then legal authority must be found in the Education Act. It is indeed found there, in my opinion, because it is an implication from the express powers of management and control.

I do not believe this ought to be a controversial conclusion. Most of us would readily accept that in order to educate students a school must maintain an orderly educational environment in which children can learn and mature. It must follow from this that schools have some form of coercive power. We take this for granted when schools determine time tables and school rules which will require students to be at certain places at certain times. Schools are not places of unmitigated freedom. The whole idea of compulsory education carries with it a degree of coercion, of power to give directions which students are expected to obey. The power of schools to search students is in my submission simply a corollary of its duty to maintain an orderly educational environment.

I look next at various sources of support for the view I have taken.

3 Cases under the Education Act 1964

I find support for my view in the two New Zealand Court of Appeal cases which considered the powers of schools in the Education Act 1964. Both are reported in 1974 and raised the legal power of schools to maintain particular school rules or practices in force.

The first was *Rich v Christchurch Girls' High School Board of Governors (No 1).*[30] A student had led a walk-out in protest at the school's practice of having hymns and Bible readings at assembly. There was subsequent disciplinary action against the student leading to her expulsion (which was deferred to the end of the year). A part of the student's argument mirrored the argument which is sometimes made about school search powers: that nothing in the Education Act 1964 authorised the imposition of religious exercises at assembly, and that there needed to be an express power to impose such a thing.

This submission was rejected by the Court of Appeal, which held that the school had an implied power to conduct and require attendance at religious observances. The power was an aspect of the school's statutory power in s 61 of the 1964 Act for "control and management" of the school. It was, of course, accepted that school rules and practices which were an unreasonable use of that power would be beyond the powers of the school. But the prescription of attendance at assembly was not unreasonable because it was allied with a practice of granting exemptions for students whose conscientious or religious beliefs so required.

29 This is accepted, for example, in the Public Issues paper (above, note 2) which, after arguing that no power of search exists, postulates use of a power of detention to keep a student while the arrival of the police is awaited.

30 [1974] 1 NZLR 1 (CA).

Incidentally, I share with other commentators who have looked at this case the feeling that, if the matter of religious exercises were to be reconsidered today (in light of the guarantee of freedom of religion in the New Zealand Bill of Rights Act 1990 and the anti-discrimination provisions of the Human Rights Act 1993) the outcome may not be the same. But for present purposes that caveat is immaterial.[31] It is enough to say that the *Rich* case readily found a coercive power over students in the general phrase "control and management of the school". The nature of the power was that the school could compel attendance save where the exemption applied and was invoked by a student. Hence the student's protest activity was characterised as a protest to a lawful command of the school. "Control and management" authorised that command.

The second case was *Edwards v Onehunga High School Board.*[32] The Board had adopted a resolution about hair length and Edwards was adjudged to fall foul of the resolution. It was argued that nothing in the Act authorised rules about hair length, since that was irrelevant to control and management of schools. The Court of Appeal readily found, however, that the rule was within the terms of the Act:[33]

> It appears to this Court that "control and management of the school" are wide and substantial topics including in their scope, of course, the control and management of pupils. The behavioural checks necessary, let alone desirable for such control in the day to day running of the school may be infinite and incapable of complete codification; but it certainly appears to us that a reasonable governing of appearance and dress fall within the ambit of matters authorised to be so controlled.

To a further submission that the particular rule, though authorised in general terms, went too far in that it affected the student's appearance in his private life, the Court answered that there was no evidential basis offered for holding that the rule adopted was not necessary for control and management.

Once again it is possible that the particular rule involved in that case would not fare so well in 1996.[34] But that is, again, immaterial for present purposes. The critical point is that the phrase "control and management" was readily considered to carry with it a power in relation to the control and management *of students.*

I believe these decisions, though removed on their facts from school searches, indicate the broad scope to be attributed to the phrase "control and management". It is not only about remote managerial matters; it is also about controlling students and their conduct through rules. The power to enforce those rules through searches, which must be reasonable, is in my view necessarily conferred also.

31 See Harrison, "Powers, Duties and Accountability of School Boards of Trustees" in *Education and the Law* (1993), p 71 and n 51.

32 [1974] 2 NZLR 238 (CA).

33 Ibid, p 243.

34 Accord, Harrison, above, note 33, p 71-72. In my paper below on Freedom of Expression in Schools I express doubts as to whether a court would intervene save in extreme cases.

The 1989 Education Act repeats the critical concept of control and management from the 1964 Act, albeit in a slightly different form.

Section 75 provides, in relation to Boards of Trustees:

> **75 Control and management of schools** – Except to the extent that any enactment or the general law of New Zealand provides otherwise, a school's Board of Trustees has complete discretion to control the management of the school as it thinks fit.

Section 76 makes the school principal the Board's chief executive in the control and management:

> **76 Principals** – (1) A school's principal is the Board's chief executive in relation to the school's control and management.
>
> (2) Except to the extent that any enactment or the general law of New Zealand, provides otherwise, the principal–
>
> (a) Shall comply with the Board's general policy directions; and
>
> (b) Subject to paragraph (a) of this subsection, has complete discretion to manage as the principal thinks fit the school's day to day administration.

Section 72 should also be mentioned: the power of a board of trustees to make bylaws "which it thinks necessary or desirable for the control and management of the school". The impression I have is that few if any schools consciously make such bylaws, and it can be noted that the school rule at issue in *Edwards* was simply treated as if it was a bylaw. Nothing of any substance turns on whether a rule is characterised as a formal by law or as an ad hoc exercise of the control and management power. Either way it must relate to control and management. A school which promulgates a formal search power for itself by enacting a bylaw cannot improve its position. Schools either have the power to undertake some forms of search or they do not. If they do, it is a power to be found in the phrase "control and management". If they do not, they cannot give themselves the power through a purported bylaw. In any event, searches are not like rules: searches are *actions* performed by staff, while rules are statements of expected conduct. There might be a school *policy* about searches but there can hardly be a rule. As an action of the principal, a search will be legally justified if it can be classed as an aspect of control and management.

There is plainly a division between "policy directions" – which s 76(2)(a) implies are for boards of trustees (though the section is in other respects directed at principals) – and "management" – which is for principals. The line between policy and management may sometimes be difficult to draw – and I am aware this can be an issue as between boards and principals – but it is difficult to imagine any set of words which would assist to make things much clearer. For present purposes we do not need to spend time on that issue. One

thing clear is that principals have powers of "control and management" within policy constraints. This arises from s 76(1), which makes the principal the executive carrying out the Board's powers, and s 76(2)(b), which vests management on a day to day basis in the principal.

My view is that on either or both bases the principal has the power to "manage" which implies the power to maintain and enforce rules directed toward the maintenance of a proper educational environment within which teachers may fulfil their educational duties. Some of the necessary rules will relate to discipline in the school. The power to search is, to repeat, a corollary of the power to maintain through appropriate rules the necessary educational environment. Individual teachers must be taken to be delegates of the principal's power for the purpose of control and management within their sphere of responsibility.

4 The position in the United States of America

I am fortified in the view that schools are lawfully empowered to undertake forms of search by the position taken in United States jurisdictions. Education there is a matter within state control and hence education law can and will differ from state to state. A recurring theme in school search cases, however, is that the public schools have a duty of maintaining an orderly educational environment and that a legal power to search, though not always explicit in state legislation,[35] is a corollary of that duty.

Some American cases will be considered to illustrate the point. In *Doe v Renfrew*[36] a female student was ordered to turn out her pockets after a drug sniffer dog had singled her out for attention in an organized drug search throughout the school. "Maintaining an educationally productive atmosphere within the school", said the Court, "rests upon the school administrator certain heavy responsibilities. One of these is that of providing an environment free from activities harmful to the educational function and to the individual students."[37]

And just last year, in *Vernonia School District v Acton*, the Supreme Court of the United States dealt with the claim that a public school's imposition of mandatory urine tests for

35 Of course, legislation may enact a search power in schools and this has occurred in some states and school districts. And in doing so it may affirm of vary the extent of the power declared by courts. So too, in New Zealand, there is nothing to prevent a school board from adopting a policy which restricts school searches more stringently than the law would otherwise allow. The only constraint would be that the Board would need to ensure that its "no search" policy did not detract from its ability to meet statutory and Charter aims of the school. See further below.

36 475 F Supp 1012 (1979).

37 The drug search was held to be a lawful exercise of the school's power to maintain its educational environment. However the search which began with a search of pockets proceeded ultimately to become a strip-search and that aspect of the process was held to be unreasonable (unreasonableness rested upon absence of cause sufficiently strong to justify extreme invasiveness of search). Incidentally, it turned out the dog was interested in the girl because she had played with her own dog that morning and it was on heat.

students wishing to partake in sports was a violation of the right given by the Fourth Amendment of the United States Constitution to be free of unreasonable search and seizures. Scalia J, for the Court, said:[38]

> Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.
>
> Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, ie., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians....
>
> ... the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."

Similar statements are relatively common in state and lower federal courts confronted with the school search issue. Indeed, the general power to search is not in doubt in American cases; the locus of the dispute in all cases is whether or not the search was reasonable, a matter to which I come shortly.[39] It is true that some of the state statutes dealing with education are more explicit than ours in that they specifically impose obligations to maintain an educationally sound environment. But the power to search reasonably is inferred from that obligation. In my opinion the same inference can be drawn in this country, even though the duty to maintain an educationally sound environment itself falls to be inferred from the Education Act provisions, and is not expressly imposed. It is to be noted, in this regard, that the United States Supreme Court in cases such as *Vernonia* and *New Jersey v TLO*[40] has not rested its decisions upon detailed, or indeed any, examination of state enactments. The same pattern is found in the federal Courts of Appeals and state courts: it is asserted without need for any citation of statutory authority that schools have a duty to maintain an educational environment. The general obligation carries with it the power of reasonable search. I see no reason why it

38 Above, note 17, p 575, 576.

39 It has to be acknowledged that United States search and seizure law, in relation to schools as well as generally, does not employ the two stage test which is now mandated in New Zealand by the superimposition of the New Zealand Bill of Rights Act 1990 on the underlying law of trespass. In New Zealand there are two separate inquiries: is a search lawful, and whatever the answer, is it reasonable? In the United States the focus of Fourth Amendment cases is whether searches are reasonable, with the implication being that if they are reasonable they are authorised. This is a position to which one is lead inexorably under a higher law constitution, since any law which authorises a search and which is held to be unreasonable in its content must be struck down. The reverse of that proposition is that common law powers of search are evolved to coincide with what is perceived to be permissible under the constitution, eg as in cases such as *Terry v Ohio* 392 US 1, 20 L Ed 2d 889 (1968). I do not think that this is a material point of distinction for present purposes. The point remains that American cases emphasise the statutory duties of the school in holding that some power to search is implicit. And that is precisely the position I contend applies in New Zealand. The critical question, here and in the United States is whether a search is reasonable.

40 See below, note 61.

should be any different in this country: the duty is clear enough in the Education Act, and the power can be inferred in the same way as it is in the United States.

5 Canadian decisions

So far as I am aware, the power of Canadian schools to undertake searches of students has arisen in only one case to date; a criminal case in which a school search was argued to be unreasonable with a view to seeking the exclusion of evidence. In this case, *R v JMG*,[41] the locus of the debate was whether the search was reasonable, and the underlying power of the school to undertake any search at all was readily inferred. It is true that the Ontario Education Act of 1980 expressly required principals to maintain "proper order and discipline" in their school, whereas our Act has no such express requirement. However, as with the American cases, I would hesitate long before ascribing any significance to this difference between Ontario's educational regime and ours. In my view it is beyond argument that a similar duty is placed upon school boards and principals in New Zealand, and that it implicitly arises out of the Education Act. Nor do I believe that the question whether there is such a duty can vary according to whether it is a criminal case or a civil case in which the question arises.

The Canadian text *Teachers and the Law* cites the *JMG* case with apparent approval.[42]

6 Other New Zealand commentators

The 1991 Public Issues Committee report reached what it stated to be a "necessarily tentative" opinion that schools have no lawful powers of search.[43] This is the strong view also of the Youth Law Project.[44]

The Commissioner for Children in the Hastings Boys' High School Case took a different view. First, he said that the school had a legal basis for maintaining good order (ss 72, 75 and 76 of the Act were cited in support, but there was no discussion). The report refers also to the School Charter (wherein the Trustees are to ensure that students are educated) and the school's one and only "rule" ("Boys are to consider others at all times"). The report concludes that:[45]

> It could be argued in application of both the Charter and the school rule that the search was to enable all students to be given an education because it aimed to prevent disruption of that education by keeping drugs from entering the school.

Though it is not clear, I interpret this to be some support for the view I have taken. Of course, the actual search perpetrated was held to be unreasonable and it would have been possible for the Commissioner to simply assume a power to conduct reasonable searches.

41 (1986) 56 OR 2d 705 (Ont CA).
42 McKay and Sutherland, *Teachers and the Law* (Emond Montgomery, 1992), 85-88.
43 See above, note 2, p 14.
44 See above, note 2.
45 Above, note 1, p 493.

7 The phrase in ss 75 and 76 "except to the extent that ... the general law of New Zealand provides otherwise"

It is necessary next to consider carefully this phrase, which appears in both s 75 and s 76. It is a qualification of both boards' and principals' power. On one interpretation this phrase points to the conclusion different from mine, that there is no power to search. That argument would run as follows:

> (a) The "general law of New Zealand" is stated to prevail over school board and principal decisions.
>
> (b) That general law includes the common law generally applicable between citizen and citizen, and between citizen and state.
>
> (c) The law of trespass to goods and trespass to the person is part of that general common law.
>
> (d) Therefore boards and principals have no power to perpetrate a search which would amount to a trespass to a person or to goods.

This argument has indeed been made on behalf of Youth Law Project.[46]

If the argument is correct, there can be no lawful power to search. The only searches which could take place in schools would be those where true consent was obtained, for they would not offend the general law of trespass.

However, I do not feel at all compelled to take this view of s 75 and s 76 and in my opinion a court would not take it either. The various premises in the argument cannot be faulted when looked at in isolation, but one must take into account also that the whole point of the Education Act was to set up a system of compulsory education and to provide for the operation of public schools. The Act therefore assuredly interferes with liberties that common law would otherwise allow: the liberty of a child to refrain from attending school and to be free of the coercion of school rules, for example. If, as I argue, the *Education Act itself* implicitly authorises searches, then the "general law" of New Zealand is plainly a law which permits searches in schools. Once that is appreciated, the phrase "general law of New Zealand" does not detract from the power to search because the implicit search powers in the Education Act qualify the general common law of trespass.

8 "Subject to any enactment" in ss 75 and 76

Next, one must consider that part of the phrase which says "except to the extent that any enactment ... provides otherwise". The principal enactment of relevance to the present problem is the New Zealand Bill of Rights Act 1990, which provides in s 21 the right of everyone not to be subjected to unreasonable search and seizure. Obviously the implied

46 See Sunday Star Times Article referred to in note 2, above.

power of search in the Education Act must be exercised reasonably, and hence in conformity with the Bill of Rights.

So I conclude that there is nothing in ss 75 and 76 which militates against the proposition that an implied power of reasonable search exists for schools. The limits and controls imposed on the power by the New Zealand Bill of Rights Act 1990 are discussed below.

9 The limited relevance of the *in loco parentis* doctrine

It has at various times been argued, both here and in North America, that the loco parentis doctrine assists in the resolution of school search problems. That doctrine is usually taken to mean that teachers stand, throughout the school day, in the place of parents and may wield a power over students which is predicated on a delegation of parental authority over those students.

Like other commentators before me, I do not consider that the loco parentis doctrine supplies an answer to the problem we are considering today.[47] In the very early age of education this account of teachers' powers made sense, for schools might be organized by parents who collectively employed a teacher. An express or at least a notional delegation of parental authority to the teacher could readily be inferred. Now, in an age of compulsory education pursuant to legislation, the notion that teacher authority rests upon a presumed parental delegation of parental powers is not at all helpful. For example, the loco parentis doctrine would logically imply that individual parents could withhold consent for certain types of instruction, yet the various statutory exemptions (eg, for religious instruction in primary schools, and the "cultural exemption" in s 25A of the 1989 Act for general curriculum matters) indicate this is not in fact the case. The more satisfactory account of schools' authority over students is that they have an implied power conferred by the state: in effect teachers are state agents rather than parents' agents.

In the United States the loco parentis doctrine has on quite a few occasions been advanced by schools wishing to make the point that the powers they wield are those of parents rather than those of the state. The point of the argument in that jurisdiction is that it leads to the conclusion that schools are not subject to the United States Constitution (and its Bill of Rights) when dealing with students. That argument is, however, seldom accepted in modern times. To that extent the loco parentis doctrine is indeed outmoded.

Nonetheless, the language of "loco parentis" is still often used in North American cases. The significant point, however, is that it is used to describe the type of authority wielded by a school rather than to explain the source of that authority. Thus, there is no difficulty in saying that schools are exercising the state's power but that, in doing so, they are charged with using that power in a manner which is solicitous for the welfare of children. Hence most modern American cases readily accept that schools and teachers must

47 The loco parentis doctrine is considered to be of doubtful utility in the general run of cases by Jan Breakwell in her paper "Control and Management of Schools" in *Education and the Law*, pp 104-107. See also Mackay and Sutherland, above, note 41, pp xvi to xviii.

observe the Bill of Rights since they are an arm of "government", while still using the term loco parentis. In doing so, they are accepting that in its dealings with children, a school can be likened to a parent. In short, loco parentis is a convenient description of the *purpose* of school power, but does not account for the *source* of the power. The source is the state.

The rationale of school searches is the need to maintain an orderly educational environment. Once it is accepted that this is the reason for the search power, it is legitimate to regard the power as implicitly conferred by compulsory education statutes, not by parents.

This is the view taken in the recent *Vernonia* case, where Scalia J said (citations omitted):[48]

> In [the 1985 case] *TLO* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints. Such a view of things, we said, "is not entirely 'consonant with compulsory education laws,'" and is inconsistent with our prior decisions treating school officials as state actors for purposes of the Due Process and Free Speech Clauses. But while denying that the State's power over schoolchildren is formally no more than the delegated power of their parents, *TLO* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," ... we have acknowledged that for many purposes "school authorities act in loco parentis," with the power and indeed the duty to "inculcate the habits and manners of civility".

For all these reasons I believe a power to search is conferred by the Education Act 1989. It is a true power to search in the sense that it does not depend on students' consent.[49] But, and this is an important qualification, the power must be exercised reasonably. I now turn to consider this in more detail.

10 Reasonableness in school searches: the impact of the New Zealand Bill of Rights Act 1990

We saw above that school powers are subject to enactments, and the Bill of Rights is one such enactment. This provides, in s 21:

> **Unreasonable search and seizure** – Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

48 Above, note 17, p 575-576.

49 Though, as I shall explain below, where the search requires student cooperation such as the emptying of pockets, removal of outer clothing, that cooperation must be sought and if not forthcoming, the search cannot be perpetrated by force. See further below.

Everyone has the benefit of this right, including students. But the burden of the Bill of Rights – ie the obligation to observe it – falls only on those persons or bodies covered by s 3:

> **Application** -This Bill of Rights applies only to acts done-
>
> (a) By the legislative, executive, or judicial branches of the Government of New Zealand; or
>
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

There is no doubt that public schools are caught by s 3(b): that is, they perform the public function of education pursuant to law. (As to the position of private schools there might be more doubt. Their existence is obviously recognised in the Education Act, and the registration system imposes a kind of quality control, but whether they supply their education pursuant to law is an interesting topic I will leave to another day.)

So, in all things, public schools must observe the Bill of Rights. My view is that even if there were no Bill of Rights we would end up at much the same position: any search powers must be exercised reasonably.

But the advantage of considering the extent of school power to search in terms of the Bill of Rights is that the large quantity of criminal litigation over the Bill of Rights provides us with important insights into the assessment of what "reasonable" means.

There are other provisions of the Bill of Rights which have been identified by other commentators as also having potential relevance to school searches. There is the provision against "degrading treatment" in s 9, and the right of all persons "deprived of liberty to be treated with humanity and with respect for the inherent dignity of the person" (s 23(5)).[50] I agree that the former may well be implicated in some forms of search, especially strip searches which are inherently antithetical to dignity. And the provision in s 23(5) will obviously apply if a "deprivation of liberty" is held to occur in the school environment – a matter about which I am not so sure. In any event, I am confident that the idea of reasonableness embraces humanity and respect for dignity, while unreasonableness would certainly be present in a case of degrading treatment. In short, I believe it is sufficient to consider only s 21: the right not to be unreasonably searched. That incorporates the related concepts of being treated with dignity and so on.[51]

The same point might be made about the invocation in this area of the United Nations

50 See Hastings Boys' High, p 495; Public Issues Committee Report, p 4.

51 It should be noted that the Bill of Rights itself provides no basis for any argument that a search is incompatible with preserving the dignity of the student. Indeed, in s 23(5) the context is persons who are deprived of liberty. And s 21 says there can be no unreasonable search, with the implication that a reasonable search is consistent with preservation of dignity. It is obviously a question of treating persons with dignity in whatever situation they find themselves.

Declaration on the Rights of the Child.[52] In my view it is not impossible to treat persons with dignity while also subjecting them to such searches as the law of the land allows, so long as that law is adjudged to be reasonable. In the area of school searches, any unreasonable search would be unlawful. Application of such a law will ensure compliance with the Declaration.

11 Reasonableness as the new touchstone of lawfulness

The first point is that the Bill of Rights introduced, explicitly, a new touchstone into the law about searches perpetrated by the state. Prior to the Bill of Rights, the focus was on whether or not searches were lawful; that is, into whether or not there was a legal power to search in the circumstances applicable, and whether the power had been exercised in accordance with the law. The fruit of illegal searches could be, but generally was not, excluded from evidence.

The Bill of Rights, by introducing a right to be free of unreasonable searches raised the question whether there might be searches which are lawful, yet unreasonable. In a sense, that question has been answered affirmatively because there is now a number of criminal cases in which a search has taken place, apparently within a statutory power, yet is held to violate the Bill of Rights because it was unreasonable.[53]

I say the answer is only "in a sense" affirmative, because when one considers the matter more closely it becomes apparent that what the Bill of Rights essentially does is supply one more ground upon which searches may be held unlawful: a search which is unreasonable violates the Bill of Rights and is *on that account* also unlawful.

As applied to schools, the position is simply this: the implied power to search which is contained in the Education Act is plainly controlled by the Bill of Rights requirement that such searches be reasonable. Any search which is unreasonable is not authorised by the Education Act. It is unreasonable, and it is for that reason unlawful as well.

12 What is a reasonable search?

Early criminal jurisprudence under s 21 has established a number of propositions. In the leading case of *R v Jefferies* several members of the Court of Appeal emphasised the broad nature of the guarantee in s 21. The guarantee protects, said Richardson J, "an amalgam of values: property, personal freedom, privacy and dignity".[54] Thomas J said that s 21 is essentially concerned with those values or interests that make up the concept of privacy.

This "privacy" rationale has been emphasised in successive cases as a concept embracing personal and property rights, but potentially broader than both. The Bill of Rights thus suggested a paradigm shift in search and seizure law, because as we saw above that body

52 See Baker, "Students retain the right to refuse a search by staff", above, note 1.
53 For example, *R v Laugalis* (1993) 10 CRNZ 350 (CA) ; *R v H* [1994] 2 NZLR 13 (CA).
54 *Jefferies*, p 302.

of law has historically been shaped by personal and property rights. Evidence which could be obtained without invading personal or property rights was not obtained by search. This would be so even if one's privacy – an interest not protected as such in law – was invaded. Early Bill of Rights cases suggested that invasions of privacy not amounting to unlawful interference with personal or property rights could yet be labelled a search.[55] The question was whether a "reasonable expectation of privacy" was invaded. If so, what had happened could be labelled a search. The search, however, might not be unreasonable. To decide if a search was unreasonable one had to "weigh all relevant public interest considerations and their application in the particular case".[56]

There are signs in more recent cases of a retreat by the Court of Appeal back to a personal and property rights approach to s 21.[57] But for our present purposes this is not really significant. In the school context the most likely type of search will be personal searches of students' clothing or of their property.[58] These are certainly interests protected by s 21.

"A s 21 inquiry", we are told in *Jefferies*, "is an exercise in balancing legitimate state interests against intrusions on individual interests".[59] Unreasonableness of a search might arise in one of two principal ways: (a) commencing search without lawful authority to do so; (b) unreasonableness in the course of conducting a search properly commenced. The first area of potential unreasonableness requires that teachers be satisfied there are legal grounds for commencing a search. The second requires that any search which proceeds is conducted reasonably.

How are we to apply these principles in the school setting? How do we reconcile students' legitimate expectations of privacy (as guaranteed by s 21) with the schools need to maintain an educational environment (as required by the Education Act 1989)? The key is to weigh up, on the facts of each case, these two competing ideas: the student rights not to be searched and the school's interest in searching when there are proper grounds for doing so.

While s 21 incorporates students' undoubted rights to privacy, dignity and property we must not lose sight of the fact that s 21 expressly permits a reasonable intrusion into these interests. They are not absolute, and nor are they to be determined by the subjective expectation of students. The standard is objective reasonableness, in which societal interests are weighed against individual interests.[60] It is only realistic to recognise that the full extent of these individual interests is not going to be present in every search. The strip search in which a student is made to remove clothes is plainly highly invasive of privacy

55 See, for example, *R v A* [1994] 1 NZLR 429 (CA).

56 *Jefferies*, page 302 per Richardson J.

57 See Optican, "Search and Seizure: an update on s 21 of the Bill of Rights" in [1996] NZ Law Rev, forthcoming.

58 It is conceivable that there could be searches of school property for infudents (perhaps their photographs might be shown to a crime victim for identification purposes) in which case privacy but not property interests would be implicated. It will suffice for this paper to consider the more likely scenario of student, bag and locker searches.

59 *Jefferies,* page 302 per Righardson J.

60 Page 305, per Richardson J, referring to road safety concerns and so on as a basis for a diminished expectation of privacy in a motor vehicle.

and dignity; much more so than, say, the pat-down of the exterior of an unattended coat hanging on a peg in the locker room or the sniffing by a drug detecting dog of the air outside a closed locker. Somewhere in the middle lie most other forms of search. There are, in other words, degrees of search.

Furthermore, it accords with common sense to recognise that students in public schools necessarily surrender some of their expectation of privacy by attending. Schools are public institutions with public functions. They are not like home. Some derogation from complete privacy is implicit in school attendance. There may be a high expectation of privacy in relation to the contents of one's bag at home or elsewhere. But this may not be so when the bag is brought to school, given the nature of a school and its duties to the community and to the student body as a whole.

These principles are, as we shall see, well recognised in the American school search jurisprudence.

On the school side there are similar matters of degree. Not every search is equally compelled. Facts might arise which cast severe suspicion on a particular student, perhaps in relation to a serious criminal offence which is being perpetrated in the school. Another case might be the reported theft of $10 with no leads to any suspect; just a room or perhaps even a whole school full of persons of whom one is presumably guilty. Common sense suggests that the response of the school cannot be the same in both these situations. There are, in other words, degrees of *cause* for searches. This principle too is established in the North American jurisprudence.

13 Grounds for commencement of search: reasonable suspicion test

As the Supreme Court of the United States said in the leading American school search case, *New Jersey v TLO*,[61] "although the underlying command of the Fourth Amendment is always that searches be reasonable, what is reasonable depends on the context within which a search takes place." The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails".[62]

That expression – balancing the need against the invasion which the search entails – is in my view the key to the school searches question.

The position taken in *TLO* is that reconciliation of privacy considerations with discipline considerations requires, as a basic principle, that searches should generally be conducted only where there is *reasonable ground for suspecting that the search will turn up evidence*. That is a significant relaxation of the standard which applies in general criminal

61 469 US 325; 83 L Ed 2d 720 (1985).
62 Page 731 (L Ed), citing *Camara v Municipal Court* 387 US 523, 536-537 (1967).

law applicable outside schools. There "probable cause" is required, with previously obtained warrants being also required absent urgency.

Speaking in a concurring judgment in *TLO* Justices Powell and O'Connor emphasised:[63]

> [T]he special characteristics of elementary and secondary schools that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a non-school setting.
>
> In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally .. The special relationship between teacher and student also distinguishes the setting within which school children operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity .... Rarely does this type of adversarial relationship exist between school authorities and their pupils.

The general proposition, therefore, is that any search by a school principal or teacher of a student or their property must be undertaken only on reasonable and individualised suspicion that the search will reveal illicit items.

Searches of persons who are "suspects" only because of their membership of a wide class of possible culprits would generally be unlawful. This means, for example, that "dragnet" or blanket searches in which a group or a whole class are searched, by reason of the possibility that they may be in possession of some contraband item, are generally unreasonable.[64] In such cases there is no individualised suspicion.

It must be emphasised, however, that the absence of individualised suspicion is not always fatal in American law. The *TLO* decision did not lay down such a wide proposition. The context and circumstances of a search may permit the "net" being cast wider. Where the extent of the invasion of privacy is very low, a correspondingly lower threshold for the search has been tolerated. Hence there are examples of searches being undertaken without individualised reasonable suspicion where the search has nonetheless been held to be reasonable. The rationale is that a school which has learned, say, of a theft, is not powerless to take action just because there is no basis for any student to be suspected. But, in the absence of individualised suspicion, only very minor intrusions into the privacy interests of students will be countenanced in the school's response to the theft. For example, a Wisconsin case upheld a random search perpetrated on jackets hung on exposed locker pegs. This was because the search did not involve an intrusion into bags or lockers, nor a personal search of a student.[65]

There are other occasions when a search which is not premised on individualised suspicion might be reasonable. An example in which a random or arbitrary search was upheld was a mandatory search imposed as a precondition to departure on a school trip.

63 Page 739 (L Ed).
64 *Bellnier v Lund* 438 F Supp 47 (1977).
65 *In Re LJ* (1991) Wisc App Lexis 96 noted in 31 ALR 5th 229.

Here the search was prophylactic, and not a response to any incident of wrongdoing. The rationale was that teacher supervision would be more difficult away from the school environment and precautionary measures to prevent the transport of illicit items were therefore appropriate. The invasion into privacy was held to be low because participation in the trip was optional and the fact of the search was known to students in advance. In this type of case the analogy is to customs and border searches, which society as a whole tolerates because in a sense they are voluntary (objectors need not travel).[66]

I am not offering these American cases as a basis for similar searches here. The reasonableness of random searches is itself a large topic which I am not able to explore in this paper. I am simply pointing out that the concept of reasonableness is flexible and involves a set of variables - the degree of invasion into privacy interests, the cogency of the need for the search, the rationale for the search, and so on.

14 Evaluating reasonableness of grounds for search

The guiding principle is that individualised suspicion ought to be the norm.[67] Any derogation from that, so entitling a search with less than reasonable suspicion of the searchee, would need to be justified by countervailing factors such as the minimal intrusion of privacy which the search method entails.

The two notorious New Zealand incidents can each be seen as offending the reasonable suspicion requirement for reasonableness of searches. In the Otahuhu search an entire class was apparently searched meaning that there was no individualised suspicion of searchees. The other facts came nowhere near justifying this departure from the norm: first the search was almost at the far end of the spectrum of invasiveness, involving a requirement to disrobe down to underwear. Second, the sum of money involved was trivial, and the very nature of the search for such a sum meant that even the discovery of $15 on a girl would have had no evidential value. This was in every way an indefensible search, and it is no surprise that the consequent litigation settled before trial. In making this criticism of the search I would add, however, that the individual teachers involved cannot be blamed given the absence in 1994 of clear guidelines.

The Hastings Boys' High strip search incident was in my opinion also an unreasonable search. Here the quest was for drugs. I come, in a later section of this paper, to inquire into whether a requirement for removal of clothing is ever going to be reasonable. But the present point is that the search was commenced without sufficient individualised suspicion of the students rounded up. It seems a whole group was under suspicion as being users of drugs. This suspicion alone could not give ground for thinking any student had drugs with them at school. The factors suggesting that drugs were in the school were, first a find of cannabis some 7 years earlier, a report from a member of a public one month earlier that boys had been seen in the school grounds "smoking something and passing it round", a visit from a parent one week earlier concerned about his or her son's drug use,

66 *Desilets v Clearview Regional Board of Education* 627 A 2d 667 (1993).
67 *New Jersey v TLO*, above, note 59.

and statements from a police officer the day before indicating the police's suspicion that a drug dealer was targeting schools. Now, all of these pieces of information were plainly of great importance to the school and it was right to take them seriously. The difficulty is that the search was then perpetrated on a group of boys known to congregate in the playing fields and smoke cigarettes and perhaps marijuana. Though this is a closer case than the Otahuhu one, in my view it still falls well on the unreasonable side of the line. I would not rule out the possibility that the search could have been justified in other respects, but the lack of reasonable suspicion in relation to individual boys made it unreasonable from the outset. The school's better course of action in light of the information it had received would have been to be vigilant, but not to have undertaken a search of any particular student until observing facts which justified an individualised suspicion of that student.

It can be objected that the standard of reasonableness will be difficult for teachers to work out "in the field". To an extent, this is true: some judgment will be required by teachers faced with a situation in which some form of search might be indicated. I think this is unavoidable, unless we were to adopt a view of the law which says that no searches of any form should happen, ever. Anything less than that is going to require judgments to be made by teachers. For example, if the view were taken that no searches should happen without student consent, one is quickly led to an analysis of "consent" in the school context. I have already suggested that consent in this context is problematic because of the inherently coercive nature of any request to search made by a teacher. If that is so, then the actions of teachers in undertaking searches even with consent should properly come under judicial scrutiny. Even on that approach, we must look to the law supply parameters within which searches by so-called "consent" are lawful. So every answer to the school search problem, save "don't do it, ever" is going to require a measure of judgment.

If the law is, as I suggest, that some form of search power is implicitly conferred by the Education Act, then there has to be a criterion upon which teachers can act. In the United States the "reasonable suspicion" test was adopted by the Supreme Court precisely because it was a test that would be workable in the field:[68]

> This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of school children. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

68 Above, note 61, pp 735-736.

In my view it is not asking too much that this standard be applied by teachers. If guidelines are provided by the Ministry, or by individual school boards after taking legal advice, then the task will be much easier. I return to the policy/guidelines issue below.

15 Reasonableness in execution of search: extent of invasion of privacy

Ranged against schools' interests in perpetrating the search is the students' right to privacy. This, as I argued above, is not a uniform concept with a fixed meaning in all settings. There can be degrees of invasion of privacy, and the law will attach differing consequences depending on how serious it is.

This is by no means a novel concept in the law. Take for example the privilege against self-incrimination, a long standing and fundamental principle in our law. The rule is applied with rigour in criminal proceedings. But Parliament has without controversy legislated numerous exceptions to that principle because certain contexts are taken to justify them. The well-known case of *Tailor v New Zealand Poultry Board*[69] affirms, for example, that it is not unreasonable that dealers and producers of eggs be required to provide information about the source and destination of their eggs, even though it might incriminate them, for only with that information can the state administer its egg marketing and distribution scheme.

Students' legitimate expectations of privacy are reduced by virtue of their presence in school. It is this which justifies a search premised upon reasonable suspicion, a lower threshold than probable cause which operates in the case of warrantless searches by police. But, as well as that, privacy interests will also vary according to the nature of the property being examined, and the reasons why. It assists to consider a number of different scenarios.

16 Searches of lockers

In many schools students are allocated lockers into which to place their personal property. The question arises whether there is a reasonable expectation of privacy in lockers such that an examination of that locker will constitute a search.

It is likely that the school will retain a master key or duplicate key, if only as a safeguard against loss of that key by the student. A number of United States cases have been decided on the basis that the "joint control" over the lockers represented by this dual access possibility meant that the school had a right to inspect it.[70] The privacy which a student could reasonably expect was in regard only to other students, not the school itself. This

69 [1984] 1 NZLR 394 (CA). The legislation did not speak clearly on whether the privilege was abrogated, hence it was a matter for judicial determination. That the majority held it was abrogated indicates that context matters for rights.

70 *Zamora v Pomeroy* 639 F 2d 662 (10th Cir, 1981); *State v Stein* 456 P 2d 1 (1969); *People v Overton* 229 NE 2d, aff'd on reh'g 249 NE 2d 366 (1969).

conclusion – that no reasonable expectation of privacy existed in relation to the locker contents – meant that the inspection did not require justification of reasonable suspicion.

I would not be sure that a New Zealand court would follow this approach, and indeed there are United States cases to opposite effect. These cases emphasise that students will reasonably and properly bring non-contraband items of various types to school: hygiene products, musical instruments, personal diaries and effects, and it is not unreasonable for students to assume that these items will be immune from inspection on a random or arbitrary basis. In some cases schools had explicitly acknowledged the fact of privacy in published statements to students.[71] Even without that form of acknowledgment other cases have affirmed that students could expect privacy in their lockers, albeit not to the same extent as at home.[72] Accordingly, a reasonable suspicion is required to undertake any search.

I believe that this is the approach which New Zealand schools should take. There is no reason why the policy should not be made clear: that lockers are the private space of students, but that the school retains the right to examine lockers where there is a reasonable suspicion that illicit material is contained in them. Though this policy is but a restatement of what I consider the law is in any event, it is no less helpful to school and student for that reason. Of course a blanket statement that privacy is guaranteed might be reasonably construed to mean that no search could take place by school authorities under any circumstances. If that were communicated to students there would be a risk that schools would be held to a higher standard than the law would otherwise require.

A school might choose to make the position clear in another way. A statement that lockers are subject to search at all times would remove any expectation of privacy. Any examination of lockers which subsequently took place would in my opinion not be unreasonable even if done without suspicion and on a random basis. But, if nothing is said, then my opinion is that students can expect privacy in their lockers. Where a reasonable suspicion arises that a particular locker contains illicit items a search will be reasonable. Without that suspicion, it will be unreasonable.

17 Clothing on pegs

The position may be different in cases of clothing placed on pegs in public spaces in schools. There is one United States case in which a jacket hanging in a cloak room was searched randomly, ie without individualised suspicion of its owner, and a gun was found. In court proceedings relating to possession of a dangerous weapon the search was held to be reasonable because of the minimal intrusion into privacy which the search involved.[73]

71 *Commonwealth v Snyder* 597 NE 2d 1363 (1992)
72 *In re Dumas* 515 A 2d 984 (1986); *State v Michael G* 748 P 2d 17 (1987)
73 Above, note 64.

I believe the safer course is to regard unattended clothing hanging on locker room pegs, or even discarded around the school as attracting an expectation of privacy. However, this must be tempered with realism. If clothes on pegs indicate through bulges, or even smell, that they contain illicit items, then the bulge or smell as the case may be provides the reasonable suspicion for the search. So, for example, a teacher picking up a discarded coat from the floor who thereby discovers reasonable grounds for suspicion in relation to the contents of that coat will, in my opinion, be able to make a reasonable search of the contents.

18 Bag searches

The leading case, *TLO*, itself concerned a bag search: a 14 year old student's purse. She had been found smoking in a lavatory in the school. Coming before the principal, she denied smoking, whereupon the principal demanded to see her bag. He opened it, found a packet of cigarettes and rolling papers. Associating the rolling papers with marijuana smoking, he searched further and found both marijuana and evidence of drug dealing within the school. The student was held to have a reasonable expectation of privacy in her purse. This was over the argument of the state that no expectation of privacy was reasonable for non-education-related items brought into schools. The search, however, being based on reasonable cause for suspicion – first that cigarettes had been consumed in violation of a school rule and then that marijuana was being smoked – was held to be a reasonable one.

It is certain that a student in New Zealand will also be held to have a reasonable expectation of privacy as to the contents of her bag. Searches of bags cannot generally take place on a random or arbitrary basis. Individualised suspicion is normally required.

19 Searches of students' persons

When suspicion arises that a student has illicit material in his pockets or concealed elsewhere, the question arises whether a search may be undertaken.

It is here that the most difficult questions arise. The starting point is to recognise that the greater the invasiveness of the search the more cogent must be the degree of suspicion and the seriousness of the suspected offence.

A number of American cases have held that requiring students to empty pockets,[74] and to remove clothing such as jackets, and shoes and socks,[75] is constitutionally permitted.

74 Pocket cases include *Doe v Renfrew* 475 F Supp 1012 (1979), *Martens v District No 220 Bd of Education* 620 F Supp 29 (1985), *Widener v Frye* 809 F Supp 35 (1992).

75 *Tarter v Raybuck* 742 F 2d 977 (6th Cir, 1986); *Cason v Cook* 810 F 2d 188 8th Cir, 1987). In the latter case the search was perpetrated by a "pat down". In New Zealand I would counsel against the use of this method of conducting a search of outer clothing as it is too open to suggestions of impropriety. Even if it were legally permissible, as it has been held to be in the United States in this case and others, it would be advisable for schools to preclude pat down searches as a mater of policy.

These cases have tended to revolve around suspicion for drug use. In every case the search was rationally related to the suspicion. It is otherwise if, say, a student who is under suspicion for seeking to leave school without authorisation is then searched. In such a case there is no link between the suspected infraction of the rules and any need for a search.[76] Such a search would be unreasonable.

A requirement that a student remove trousers or skirt, or undergarments is in my opinion going to be extremely difficult to justify. Certainly there was no prospect of it being justified in the 1994 incident at Otahuhu College where there was no individualised suspicion and the missing property was a small sum of money. In the United States a strip search for a missing $100, carried out in relation to a student upon whom suspicion fell was unreasonable even though the search in fact revealed the $100 in his pants. The court distinguished theft of money from the greater threat of weapons or drugs.[77]

On the other hand strip searches have on occasion been upheld in the United States in relation to drugs.[78] Once again, all depends on the facts. Nevertheless, I would advise extreme caution in this area. It seems to me that if the degree of suspicion arises which could justify a strip search then it is likely to relate to illegal items in which case the far better course for teachers would be to call the police and advise them of their suspicions. It would then fall to the police to undertake the search if the information they receive is judged by them to afford them grounds for a search under the Misuse of Drugs Act 1975.

A further reason why I would counsel caution in strip searches even in drug cases is that the United States cases holding strip searches constitutional on certain facts need to be understood against the background of a school drug and weapons problem which by all accounts is much more serious than ours. I believe the New Zealand community would, and should, regard strip searches by teachers in schools as unacceptable. This would have an important bearing on "reasonableness" under the Bill of Rights which incorporates community standards.

I believe, however, that search of outer clothing falling short of a strip search may well be reasonable in cases of individualised suspicion. Hence it is my view that on appropriate facts it may well be reasonable to require a student to remove outer clothing such as a jacket or jersey, and shoes and socks.

A number of United States cases have upheld searches in which jackets and shoes and socks have been searched, generally in relation to drugs or stolen property.

76 *Coronado v State* 835 SW 2d 636 (1992).

77 *State v MAB* (1993) 433 SE 2d 41.

78 *Williams v Ellington* 936 F 2d 881 (6th Cir, 1991), suspicion that student had glass vial containing white powder which students had been seen to sniff; *Cornfield v Consolidated High School District No 230* 991 F 2d 1316 (7th Cir, 1993), suspicion that student had hidden drugs in underpants; *Widener v Frye*, above, note 72.

20 The use of force and the significance of student cooperation and consent

It follows from the nature of a legal power that it is able to be exercised without consent. If one has to ask permission to undertake a search, it would more accurately be termed a "liberty" to search: schools are free to ask students if they agree to be searched, while students are free to refuse. In my view, however, schools enjoy a true power to search in the sense that it is not dependent upon student consent. That said, the existence of cooperation by the student will in many cases be relevant to whether or not the power is exercised reasonably. It is necessary to explain this important point in more detail.

First, some searches may arise in contexts where consent is not necessary in order to allow the search to be completed. That will be the case with desks and lockers (where in the latter case the school will hold a duplicate key). So too, searches of bags or other possessions which are in the custody of teachers for any reason may be executed without consent. (I am assuming here that other indicia of reasonableness including individualised suspicion are present.)

Where the proposed search is to be performed on a student the position is a little different. In my view the appropriate step is to require the student herself to remove items of outer clothing such as a jacket, or shoes and socks. This plainly requires cooperation. If the student refuses to cooperate, then the search could only proceed if force were used. However, I believe the use of force would render a search unreasonable. It would represent too great an intrusion into the zone of privacy surrounding a student. Once again, I do not think the community would, or should, countenance the use of force by authorities in a school. If such a search is to proceed at all it will depend upon cooperation. But I do not think that this means that the school has no "power" of search.

First, many searches can, as I have said, be executed without need for consent. Second, in my view the sanction for a student who refuses cooperation by refusing to remove, say, a jacket for inspection, is that she may properly be regarded as having refused to obey a lawful request. Various sanctions might then be possible, of which disciplinary action is one.[79]

In this way cooperation assumes significance in the area of personal searches, but its significance lies in the fact that it allows the search power to be exercised without the use of force (which, if used, would almost always render the search unreasonable). Cooperation does not serve the role of allowing something to be done which would otherwise be

79 Depending on circumstances another sanction is that a student be treated as if the refusal constitutes an admission of possession of the illicit item - not, of course, an admission with any evidential value in a criminal sense, but an admission which could lead to administrative consequences within the school. So, for example, if there were grounds to suspect alcohol was secreted on a student at a school camp and this could not be verified through a search, then that student could be subjected to heightened supervision by teachers. In other contexts the exercise of rights by citizens can have similar consequences, eg the right to refuse testing for an infectious disease may, if exercised, result in the person being treated as if they have the disease.

beyond a school's power. It enables something within a school's power to be done reasonably.

I have used the term cooperation rather than consent to emphasise that, in my view, the student's mere acquiescence cannot be termed a consent so as to cloak with apparent legality even a search which is unreasonable on the test I propose. For example, if contrary to my view, it were truly the case that schools have no powers to search but must carry out any searches with consent, then theoretically even a strip search could be consented to. That, in my view, would be problematic. In my view the better approach is to say that a search would be unreasonable at its inception if a teacher were even to *require* that the student remove anything more than outer clothing. Consent should not and cannot extend the lawful powers of the school.

The other difficulty with consent is that its very existence will often be problematic in the school context. The power imbalance between teacher and student is such that acquiescence may effectively be coerced. It is doubtful that this can be termed a true consent. And, it must not be forgotten, students are minors. Although the *Gillick* case reminds us that minors of maturity have the capacity to consent to medical treatments, it is not clear to me that the case is helpful in the school search context.[80] Further, when constitutional rights are at stake it is not just a matter of "consent"; the state must prove a knowing and intelligent waiver of those rights.

This was considered in *Tarter v Raybuck*[81] where the Sixth Circuit Court of Appeals refused to hold that the student's acquiescence in removing his outer clothing on request amounted to a waiver of his constitutional rights not to be unreasonably searched. The student said that he had consented because he was afraid. The Court readily accepted this, as it should have. It went on to hold, however, that the search was within the school's power because it was reasonable and hence constitutional.

The significance of cooperation, therefore, is that it will allow a search, which a school is lawfully empowered to conduct, to be carried out reasonably. Absent cooperation, force should not be used, and other sanctions must apply. But even "consent" or cooperation cannot save an unreasonable search.

The one United States case I have come across which appears to involve something like force is *Delaware v Baccino*[82] in which drugs were found in a coat. Prior to the search the student had had the coat; the principal secured it only after a "tug of war". He found cannabis in it. It was held that the search was reasonable. The apparent use of force implicit in the "tug of war" was not discussed in the case. That is, it was assumed that it made no difference.

80 In *Gillick* the context was access to medical consultations about contraception, which students could be expected to want and need. There was no suggestion of such consultations being forced upon unwilling minors.

81 742 F Supp 977, 980-981.

82 282 A 2d 869 (1971).

In practice then, cooperation should obviously be sought to any search: "please empty your pockets" is no doubt a common example. If cooperation is not forthcoming and circumstances otherwise indicate, the appropriate response may well be to call the police or parents, and detain the student under supervision. Alternatively, the refusal to cooperate may be advanced as an independent disciplinary matter of disobedience.

Finally, it must be said that even the use of force might on occasion be reasonable. If it is believed that a student has a weapon with which he may cause imminent harm to himself or others, and it is not surrendered voluntarily, then no teacher would be held to have acted unreasonably in attempting through force to search the student and seize the weapon.

21 Dealings with police

Police may on occasion wish to visit a school to interview students either as potential witnesses or as suspects. There may also be occasions when schools may wish to call in police because of suspicions they have about individual students, or because of what has been found on a student. A number of points may be made here.

The starting point is that schools have no obligation to cooperate with police in law enforcement. The power of search which in my view exists is predicated on maintaining an educational environment, not the eradication of crime per se. Consequently I have no difficulty with the notion that where criminal activity is uncovered – especially "victimless" offending such as drug possession – a school may well decide not to involve police but to inform parents instead. This may be in the child's best interest.

A school which has gained reasonable suspicion to perpetrate a search on a student who is believed to have drugs may well wish to detain that student while the police are called. I would not regard it as their legal obligation to do so, but it is a perfectly defensible policy. Parents should be notified in this instance also.

Other occasions will arise when police on their own initiative seek access to students to interview them as witnesses or suspects. Here the educational aims of the school are likely often to work in harmony with the police duty to investigate and eradicate crime in schools. This means that schools may choose to cooperate with police by permitting access to their students. But this must be done with the interests of the school's students firmly in mind as well.

In practice, this will generally mean that schools should advise parents of the wish of the police to speak to students, giving an opportunity for them to be present or for another adult of the student's choice. Ordinarily, police will be cooperative in this. I say ordinarily because it is conceivable that police may seek to give instructions that parents or specified others not be contacted in special cases. This could be because of the nature of the inquiries which are being made, and to prevent others from being alerted. If such a direction is given to a school I believe schools will need to observe the direction, as to do otherwise could lead to a charge of obstruction of a constable in the execution of his or

her duty. Even a school policy along the lines "parents will always be notified" could not amount to a defence to such a charge if the other elements of that offence were established.

Upon the arrival of police any search which takes place will fall to be justified by the standards regulating police searches. The lower threshold of reasonable suspicion which might justify a school search cannot inure to the advantage of police called in by a school. Nor, in my opinion, could the police at that point delegate to the principal the task of searching so as to, as it were, take advantage of the lower threshold. Once the police are there, it is a police matter to be judged by applicable standards of police conduct.

22 The need for a school policy and guidelines

It would be helpful for all schools to have guidelines, and the Ministry of Education would be an appropriate source of those guidelines. Of course, just as this seminar paper is one person's view, so the Ministry's guidelines would be just another view: they would not represent the law on the point which can only be determined by a court or by Parliament. Plainly, however, any guidelines issued by the Ministry will and should be influential in schools.

In the meantime it is desirable that a school itself should decide upon and publish a policy on school searches. This will assist both staff and students to know where they stand. If a school and its advisers agree with the position taken in this paper, then a policy could include the following matters:

Purpose of searches: recovery of stolen property or detection of illegal weapons and substances, or of any matter reasonably believed to be a threat to maintenance of an orderly educational environment.

What may be searched Bags, lockers, clothing not being worn. As to clothing worn by a student, teachers may request that coats, jackets, jerseys, shoes and socks be removed for inspection. No student will be required to remove other items of clothing.

Grounds for search: In general an individualised suspicion of a particular student is required before a search may proceed.

Use of force: No force may be used save in extreme circumstances involving threat of imminent harm.

Depending on the nature of the school and its circumstances, variations and additions to this are possible. For example, cars brought to school by students have been held in the United States to be subject to the same educational search regime, meaning that searches are possible on reasonable suspicion.

Schools will be well advised to take legal advice on formulation of such a policy. A little money spent on that advice may save a lot of money later on. Policies need not be

coextensive with what the law would allow. It is open for a school to require more stringent grounds for searches, but not less.

23 Information to students and parents upon search

Teachers purporting to exercise search power ought to advise students of the basis of their suspicion and the reason for their search. This procedure has its analogue in general searches under other enactments. Only through such notification can a student form the view that a search is justified and ought not to be resisted. Further, parents ought to be notified after the event in relation to all searches. This ensures a degree of publicity and monitoring of school activities in the area of searches.

A policy whereby parents or caregivers might be notified in advance of personal searches (that is, where students are required to remove outer clothing) could also be adopted. I would see this as a very sensible policy to have, although I do not think that a search (of the type I describe) which is otherwise reasonable would be rendered unreasonable through failure to advise parents in advance. And only a reasonable time need be spent in attempting to contact parents. However, as I say, in all cases, advice to parents after the event ought to be required as a minimum. I believe that the courts would and should be concerned to ensure scrutiny of school activities in this area, and it is therefore possible that a failure to so notify could be a factor suggesting unreasonableness of the search (but not necessarily determinative on its own).

Conclusion and summary

My view is that a legal power for schools to search students exists. But it is a power only to undertake reasonable searches. The guiding principle is weighing the need for the search against the invasiveness of the search. In particular, force is extremely invasive of bodily integrity and will render a search unreasonable unless the countervailing reason for the search is one of avoiding imminent and serious harm to the student or others. The requirement of reasonableness means that, in practice, student cooperation must be sought for the examination of the contents of pockets and clothing. Requirements to remove clothing for inspection ought to be limited to outer clothing such as jackets, jerseys, shoes and socks. A strip search in schools, even if students acquiesce through cooperation, is likely to be unreasonable.

I believe the approach which I advocate is solicitous for the welfare and dignity of children. It ought to avoid their even being asked to cooperate in strip searches, for example. And it will mean in practice that even though criminal conduct such as possession of drugs might be revealed, the matter will not necessarily be reported to the police (as would be the case if the law required that all suspicions be reported to police and could not be acted upon by school officials). I believe it to be appropriate that schools deal with such matters in house where their judgment is that it would be in the interests of the student to do so. It must not be forgotten that the power is predicated on the educational needs of children (both the searchee and others), not eradication of crime in the community.

If "reasonableness" of searches seems too imprecise a standard for day to day operations in schools, two things may be said. First, the touchstone of reasonable suspicion was expressly developed by the United States Supreme Court as a workable standard which teachers in the field could discern through the application of common sense. Second, it is worth noting that the two searches to have attracted national publicity in this country were each examples of searches which clearly failed the reasonableness test. If, then, searching of students is relatively common (as Youth Law Project has suggested) and there is little complaint (or little complaint which is seriously pursued and virtually never in court), this could suggest that most of what happens in schools is in fact reasonable. The practical common sense required to make determinations of reasonableness is probably there already.