

24 April 2025

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President Kingham - Chair
Queensland Law Reform Commission

E: <https://www.qllrc.qld.gov.au/reviews/review-of-particular-criminal-defences/submission>

Dear Chair,

Thank you for your invitation to submit a submission in relation to your consultation paper: Review of particular criminal defences. As is relevant to the work of the College, these defences include the following Criminal Code defences:

- section 268 – Provocation to assault
- sections 271 and 272 – Self-defence for provoked and unprovoked assault
- section 280 – Domestic discipline.

We have specifically been requested to address section 280 (domestic discipline) and question 21 of the Consultation Paper. This is because it currently provides a defence to teachers for the use of such force as is reasonable under the circumstances towards a child or student for the purposes of correction, discipline, management or control.

The Criminal Code defences under review are not excluded from application in disciplinary proceedings against teachers under the *Education (College of Teachers) Act 2005* (the Act).

We have one recent decision – *Queensland College of Teachers v MXQ* [2025] QCAT 60 – which provides a good case study as it considered whether a combination of the above criminal defences applied. The QCAT decision was adverse to the College, particularly in relation to the sanction imposed, and is currently subject to appeal.

The Criminal Code defences apply to the following functions of the College under the Act:

1. The main objects of the Act as set out in section 3(1) are to be achieved by, amongst the conferral of other functions and powers, taking disciplinary action against approved (or registered) teachers.
2. The College has a mandatory reporting obligation to immediately suspend, report and refer teachers charged with serious offences to QCAT for disciplinary action. See sections 48, 92(1)(h) and 92(2) of the Act.
3. Suspension and referral may also apply where other criminal charges which are not serious offences are laid against a teacher. See sections 49, 92(1)(b) and/or (h) of the Act.
4. A “serious offence” is defined under the Act to adopt the meaning of this term under the *Working with Children (Risk Management and Screening) Act 2000* (WWC Act). See Schedule 3 of the Act and s15 and Schedule 2 of the WWC Act.
5. The only domestic violence offence currently included as a serious offence under the WWC Act is section 315A of the Criminal Code which includes choking, suffocation or strangulation in a domestic setting.
6. Queensland Police Service (QPS) have a mandatory requirement to notify the College under section 75 of the Act of any change to “criminal history” which is defined to include every charge of an offence in Queensland or elsewhere.

7. Following serious offence charges, referral to a practice and conduct body occurs regardless of whether a teacher is acquitted, a nolle prosequi presented, or charges are discontinued or dismissed against teachers under section 92(2) and (5) of the Act.
8. QCAT or an internal statutory Practice Capacity and Teacher Conduct Committee (PCTCC) – depending on the likely sanction - become a second set of eyes to review the conduct for disciplinary purposes - applying the lower Briginshaw civil standard of proof.
9. Where no criminal conviction results from serious offence or other criminal charges, or there is alleged inappropriate conduct, the College may take suspension and/or disciplinary action for conduct which, whether connected with the teaching profession or otherwise, is not considered to meet the standard of behaviour generally expected of a teacher under section 92(1)(h) of the Act.
10. The phrase 'standard of behaviour' is not defined and is judicially accepted to be fluid and informed by how the community, including the teaching profession, would expect a teacher to behave.
11. In performing its functions under the Act, the welfare and best interests of children are to be the primary considerations of the College.

The MXQ decision provides an example where QCAT considered and applied (in part) the above defences in disciplinary proceedings taken against an experienced male teacher arising from a classroom physical altercation he engaged in with a 14-year-old year 9 female student. While there was conflicting evidence and some facts of the incident were unclear, the Tribunal accepted that the student threw the first punch to the teacher's head and that the teacher responded by pushing her back, before the physical fight continued culminating with the teacher kicking the student in the head.

The MXQ background facts were as follows:

- A 14-year-old female student demonstrated disruptive behaviour (including verbal abuse and threats) during a year 9 math class.
- After the student returned to the classroom - following an initial period outside for "time out" to reflect on her disruptive behaviour - her teacher told her to leave the classroom again after her behaviour did not improve on return.
- Her teacher was an experienced middle aged male teacher with a clean record.
- After exiting the classroom, the student turned around to re-enter back through the classroom doorway to retrieve her forgotten mobile phone.
- The teacher intercepted her at the classroom doorway to block her path to prevent her return.
- While the facts were not clear and the evidence conflicting, the Tribunal accepted that the student first punched the teacher in the face, and the teacher then pushed (not punched) her back.
- The student and the teacher then ended up in a physical fight on the ground outside the classroom for a period of ~2 minutes, which culminated in the teacher kicking her in the head after she kicked him in the genitalia.
- The student was taken to hospital but was not seriously injured.
- The student could not be located to give evidence at the hearing.
- The teacher raised provocation and self-defence in his defence to disciplinary proceedings alleging that he did not act in a manner consistent with the behaviour generally expected of a teacher.
- The teacher stated in cross-examination at his disciplinary hearing that he was defending himself and that he would do the same thing again in the same situation.

A summary of the Tribunal's consideration and application of the above defences is found at paragraphs [146] to [150] of the MXQ decision as extracted below:

[146] The applicant has made the submission that it

...doesn't suggest that if assaulted a teacher is not entitled to take action to defend themselves from that assault. A teacher has the same rights as anyone to self-defence. However, this doesn't mean that a teacher when confronted with physical violence from a student should respond with like violence. Teachers are expected to employ behavioural techniques to respond to disruptive students.

If a teacher is pushed, it's not expected behaviour that a teacher will respond by pushing the student. If a teacher is punched, it is not expected behaviour that a teacher will respond by punching the student. If a teacher is kicked, it is not expected behaviour that a teacher will respond by kicking the student - particularly not in the head - and not when the student is a 14-year-old girl.

[147] That submission does not grapple with the realities of this melee, caused by aggressive, insulting, even humiliating, but legally provocative conduct of the student, nor provide any useful guidance as to how to reconcile the fact that a teacher with a faultless history is subjected to unprovoked violence, is entitled to take action to defend himself from that assault. It does not grapple at all with the effect of provocation on the teacher. Its reference to teachers being expected to employ behavioural techniques to respond to disruptive students does not respond to his evidence, which we accept, that he was employing behavioural techniques to respond to this disruptive student.

[148] Early during the hearing, the respondent had told the Tribunal that what he did that day, he would do again. By the end of the hearing, he told the Tribunal that a kick was not something he would do again, but the basis for that was to do with the trouble it had landed him in, not an acceptance that the kick was inappropriate.

[149] Sadly, this lack of insight about the inappropriateness of administering a controlled kick to of a student, albeit one who had just kicked him severely, and of the potential seriousness of a kick to a student's head, albeit accidentally landing in the student's face, must result in the respondent's downfall. The kick itself was not administered compulsively, without thinking about it or defensively. It was certainly the result of severe provocation, verbal and racial abuse, insults and threats of physical violence as well as significant actual violence perpetrated on him up to that point. We do not accept that it was necessary for his own protection or that of his class. We do not accept that he did not have an alternative to taking that course or that he did not have a better choice.

[150] As it turned out the kick was misplaced, and landed grazing her face; however, when one engages in such conduct, the consequences cannot be predicted, and the student may well have been severely injured had the kick struck her temple or throat.

We will address in turn the various consultation proposals and questions relating to each of the above defences, as they have impacted on the functions of the College.

Self-defence: without provoked assault (s271); with provoked assault (s272) and aided (s273)

P1 Repeal sections 271, 272, 273 of the Criminal Code and replace with a provision that provides that a person acts in self-defence if:

- (a) the person believes that the conduct was necessary –
 - i. in self-defence or in defence of another or
 - ii. to prevent or terminate the unlawful deprivation of liberty of themselves or another and
- (b) the conduct is a reasonable response in the circumstances as the person perceives them.

The provision should also provide:

- (c) Self-defence should only be available as a defence to murder where the person believes their conduct is necessary to defend themselves or another from death or serious injury.
- (d) Self-defence does not apply if –
 - i. the person is responding to lawful conduct and
 - ii. the person knew the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

Q1 What are your views on proposal 1?

Q2 For the purposes of proposal 1:

- (a) how should 'serious injury' be defined?
- (b) should a non-exhaustive list of factors be included to assist in determining whether the person claiming self-defence has acted reasonably?

The College:

- supports proposal 1, if amended with a non-exhaustive list of factors to be included to assist in determining whether the person claiming self-defence has acted reasonably as proposed by Q2(b) above; and
- has no submission to make in relation to Q2(a) definition of serious injury.

P3 The new self-defence provision should provide that self-defence is not available where the person's belief that their actions were necessary and reasonable was substantially affected by self-induced intoxication.

Q4 What are your views on proposal 3?

It follows that a person who is impaired by self-induced intoxication, is not able to satisfy the subjective test that their actions were necessary and reasonable in the circumstances. The College therefore supports proposal 3.

Defence of provocation (s269) and prevention of repetition of insult (s270)

P6 The defence of provocation in section 269 of the Criminal Code should be amended so that the defence does not apply to domestic violence offences as defined in section 1 of the Criminal Code.

P7 The defence of prevention of repetition of insult in section 270 of the Criminal Code should be amended so that the defence only applies to offences of which assault is an element and does not apply to domestic violence offences as defined in section 1 of the Criminal Code.

Q14 What are your views on proposal 6?

Q15 What are your views on proposal 7?

In the same way that you seek to exclude the application of the defence in both sections 269 and 270 to domestic violence offences, we request that consideration be given to also extending this exclusion to, or limiting its application in, situations where a teacher has assaulted a student in a school setting for the reasons below which are highlighted by the MXQ decision:

- The adult/child relationship that exists between a teacher and a student.
- Teachers are trained in how to manage disruptive children, which includes responding to verbal and threatening abuse, as part of their role.
- Teachers should demonstrate role model behaviour, as part of their role.
- Teachers should implement their respective school behaviour plan strategies to de-escalate and manage issues where students exhibit disruptive behaviour and make poor decisions.
- Teachers should strive to always retain self-control, as part of their role.
- The defence of self-defence will remain in place to protect a teacher who acts reasonably to defend themselves or others from imminent harm from a student.
- See the Tribunal finding in the MXQ decision at paragraph [153] excusing most of the teacher's physical conduct because of provocative conduct:

...the physical conduct of pushing, hitting or pulling down the student resulted from provocative conduct from the student having initiated violent insulting humiliating and disrespectful conduct toward a teacher, punching him in the face and ultimately kicking the teacher in the genitalia.

- In MXQ, the Tribunal does not appear to have considered age or maturity disparity when considering provocation as a defence.

While it is noted that the proposed self-defence provision will afford protection from criminal liability to a teacher who acts to aid a student from harm from another, it is not considered that this will adequately cover all scenarios in a school setting where a teacher may be required to take steps to "control or manage" students.

Domestic Discipline (s280)

Our Research – attitudes and opinions

Community Attitudes Survey

- Participants were generally supportive of a defence being available for parents where they used minimal force to discipline a child.
- There was broad support for the defence of domestic discipline where a teacher used very low levels of force for the purpose of management or control but not for the purposes of discipline or correction.
- Focus group participants did not support the use of violence against children for discipline.
- Participants did not favour a criminal justice response in cases involving minimal force and instead suggested increased social support.
- Participants were more likely to say a parent should be found guilty of assault if the perceived or potential harm to the child was greater, including where the parent used an implement, left bruising or slapped the child in the face.

It is noted that the outcome in the MXQ decision does not reflect community expectations outlined in the feedback in dot points 2 and 5 above of the consultation paper at page 74.

Question

Q21 Do you support:

- (a) option 1: repeal section 280 of the Criminal Code or
- (b) option 2: limiting the application of section 280 (and if so, how) or
- (c) some other approach?

The College supports option 2 with clear legislative guidance, through the use of examples, on the type of situations where it is intended to apply. It is considered that teachers may require legislative protection from criminal liability - as a bar to prosecution - in situations where they are acting to “manage or control” students using low levels of force. For example, a teacher may be required to touch or grab a student on the upper body or arm by way of restraint to protect another student from harm.

The College does not consider that the defence of self-defence can adequately cover off all potential situations where a teacher may find themselves needing to act to “manage or control” students. This is highlighted by the MXQ decision where the Tribunal examined the conduct of the teacher at various stages leading up to, and during, the physical altercation between the student and the teacher.

In MXQ, the Tribunal ultimately found that only the kicking of the student in the head at the end of the physical altercation fell short of conduct generally expected of a teacher; and that the teacher’s conduct in the lead up to the kick to the student’s head did not. See paragraphs [152] to [154] extracted below for ease of reference. The College does not share this view, as outlined in paragraph [146] of the decision extracted above.

- [151] In our view the disciplinary ground in s 92(1)(h) is established in relation to the act of kicking the student.
- [152] We do not find that his conduct leading up to that kick was, in the circumstances, conduct falling short of the standard of behaviour generally expected of a teacher who might be found in that specific situation. In our view there was nothing in his conduct up until the student sought to re-enter the classroom that did not satisfy the standard of behaviour generally expected of a teacher in that situation. He was attempting to maintain discipline and control of the classroom and protect the other students under his care. He swore that he had learnt a lesson from an example he had encountered during his teaching career, of a teacher who had sat and done nothing as a student was murdered in front of the class.
- [153] As for the “fight” he engaged in outside the classroom door, the physical conduct of pushing hitting or pulling down the student resulted from provocative conduct from the student having initiated violent insulting humiliating and disrespectful conduct toward a teacher, punching him in the face and ultimately kicking the teacher in the genitalia. We accept his evidence, unchallenged in cross examination, that the teacher was seeking to maintain control of the classroom, and provide some level of protection and safety to the other students, and was acting in self-defence in doing what he did, including in kicking her to try to diffuse the situation.
- [154] He was criticised by the applicant for not diffusing the situation by letting her enter the class room to get her phone. We are not persuaded that had she been allowed to do so, it would have diffused the situation at all, and she would have been back in the room, ready, willing and able to assault the teacher, or damage his property, or further engage with the teacher. It is noteworthy that not only did she seek to damage his property when she did re-enter, but she smashed her own phone shortly thereafter in the presence of another teacher.

The MXQ decision also provides an example of where police identified the availability of section 280 as a potential bar to prosecution against the teacher, noting that the student in question and her mother did not make a formal complaint against the teacher.

It is noted that, as the consultation paper states at page 76, the use of physical punishment in state schools has been prohibited for many years. For this reason, it is submitted that section 280 need only apply for “management and control” and not “punishment and correction” purposes.

In so far as it impacts on the ability of and timeframes within which the College can institute disciplinary proceedings where a teacher is charged with serious or criminal offences, the College generally supports reforms to criminal law and procedure to facilitate:

- (a) early identification of self-defence in criminal investigations and prosecutions
- (b) early resolution of criminal prosecutions.

A table which sets out examples which demonstrate the operation of the above defences in College disciplinary matters against teachers for serious offences, criminal offences and/or alleged inappropriate conduct is **attached** for your information.

Please do not hesitate to contact [REDACTED] Manager, Discipline and Appeals on email: [REDACTED] or phone: [REDACTED] if we can assist further.

Yours sincerely

[REDACTED]

Deanne Fishburn
Director

Encl. (2): Annexure 1. QCT v MXQ [2025] QCAT 60
 Annexure 2. Table – College defence examples

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Queensland College of Teachers v Teacher MXQ*
[2025] QCAT 60

PARTIES: **QUEENSLAND COLLEGE OF TEACHERS**
(applicant)

v

TEACHER MXQ
(respondent)

APPLICATION NO/S: OCR086-23

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 17 January 2025

HEARING DATE: 13 and 14 November 2024 and written submissions
dated 6, 18 and 20 December 2024

HEARD AT: Cairns

DECISION OF: Member P Roney KC presiding
Member Dr W Grigg
Member V Knox

ORDER/S:

1. **A disciplinary ground in s 92(1)(h) of the *Education (Queensland College of Teachers) Act 2005* (Qld) is established.**
2. **Teacher MXQ is issued with a reprimand under s 160(2)(c) of the *Education (Queensland College of Teachers) Act 2005* (Qld).**
3. **The suspension of the teacher's registration as a teacher is ended under s 160(2)(b) of the *Education (Queensland College of Teachers) Act 2005* (Qld).**
4. **The Register of Teachers is to be endorsed with a notation under s 160(2)(i) of the *Education (Queensland College of Teachers) Act 2005* (Qld) as follows:**
 - (a) **Other than to the parties to this proceeding and their legal representatives, and until further order of the tribunal, publication is prohibited of any information that may identify the respondent, the student, or the school, other than to the extent necessary for the Queensland College of Teachers to meet its statutory obligations and as**

provided for under the *Education (Queensland College of Teachers) Act 2005* (Qld). The teacher may give a copy of this decision and the reasons to any regulatory authority or employer in compliance with any disclosure requirements.

- 5. The Queensland College of Teachers may provide a copy of this decision to any regulating authority or employer in compliance with any disclosure requirements.**
- 6. We grant the parties liberty to apply in respect of any other consequential or other orders which might be required to be made.**

CATCHWORDS:

PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – OTHER PROFESSIONS, TRADES OR CALLINGS – whether a ground of disciplinary action is established against an approved and experienced male mathematics teacher, whether a sanction of three to five years suspension or any suspension period is warranted having regard to the seriousness of the conduct and the lengthy passage of time since the relevant event – where the physical conduct of pushing and kicking a female student resulted from provocative conduct by the student having initiated violent insulting humiliating and disrespectful conduct toward a teacher and kicking the teacher in the genitalia – whether, where the teacher was seeking to maintain control of the classroom, and provide some level of protection and safety to the other students, this was a serious breach of conduct – where the respondent does not generally pose an unacceptable risk of harm to children

EDUCATION – EDUCATORS – DISCIPLINARY MATTERS – GOVERNMENT INSTITUTIONS – where teacher's registration was suspended – where conduct occurred in the course of teaching – whether there was serious behaviour but an isolated incident resulting from provocation – whether ground for disciplinary action exists – where appropriate sanction discussed

PROCEDURE – OTHER MATTER – the scope of operation of section 97(4)(b) of the *Education (Queensland College of Teachers) Act 2005* (Qld) that provides that the Tribunal must have regard to the information provided by the applicant – reconciliation of the tension between Section 97(4)(b) of the Act, and the

duty of the Tribunal to hear and determine the issue of whether the teacher has behaved in a way, whether connected with the teaching profession or otherwise, that does not satisfy the standard of behaviour generally expected of a teacher applying the principles to be derived from the decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 – weight to be provided to witness’ evidence where witnesses not called by an applicant and not made available for their evidence to be tested.

EDUCATION – EDUCATORS – SANCTION FOR MISCONDUCT – CANCELLATION OF REGISTRATION OF TEACHERS – where delay occurred in advancing the disciplinary proceedings – whether the registration of the teacher should be cancelled, or the suspension be ended

PROCEDURE – OTHER MATTER – where a non publication order should be continued, subject to the necessary exceptions to enable compliance with s 164 and s 165 of the *Education (Queensland College of Teachers) Act 2005* (Qld).

HUMAN RIGHTS – whether cancellation of teacher registration is an act compatible with sections 8, 19 and 24 of the *Human Rights Act 2019* (Qld)

Education (Queensland College of Teachers) Act 2005 (Qld), s 3(1), s 3(2), s 97, s 160, s 164, s 165, sch 3

Human Rights Act 2019 (Qld), s 19, s 24

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 9, s 66

Amador v Amador [2009] FamCAFC 196

Briginshaw v Briginshaw (1938) 60 CLR 336

Department of Health v Arumugam [1988] VR 319

Helton v Allen (1940) 63 CLR 691

Holder v Law Society [2003] 1 WLR 1059

Johnston & Ors v Carroll (Commissioner of the Queensland Police Service) & Anor; Witthahn v Wakefield (Chief Executive of Hospital and Health Services and Director General of Queensland Health); Sutton & Ors v Carroll (Commissioner of the Queensland Police Service) [2024] QSC 2

Leigh v Bruder Expedition Pty Ltd [2020] QCA 246

M v M (1988) 166 CLR 69

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449

Rejtek v McElroy (1965) 112 CLR 517

S v R (1999) 149 FLR 149

Sharma v Legal Aid (Queensland) [2002] FCAFC 196

Queensland College of Teachers v Armstrong [2010] QCAT 709
Queensland College of Teachers v BDA [2023] QCAT 141
Queensland College of Teachers v Carroll [2012] QCAT 395
Queensland College of Teachers v CMF (No 2) [2016] QCAT 290
Queensland College of Teachers v DGM [2018] QCAT 194
Queensland College of Teachers v Mears [2012] QCAT 327
Queensland College of Teachers v PPK [2019] QCAT 59
Queensland College of Teachers v Teacher GBO [2024] QCAT 179
Queensland College of Teachers v TSV [2015] QCAT 186
Queensland College of Teachers v TWF [2024] QCAT 447
Queensland College of Teachers v XYZ [2019] QCAT 283
Queensland College of Teachers v XYZ (No. 2) [2022] QCAT 47

APPEARANCES & REPRESENTATION:

Applicant: T C Schmitt of Counsel instructed by Queensland College of Teachers

Respondent: Self-represented

REASONS FOR DECISION

- [1] In February 2020 the respondent to this proceeding was a teacher ('the teacher') who is now aged in his mid-50s. On 3 February 2020, the respondent was teaching in a class when he had a physical altercation with one of his female students, as a result of which his employment was suspended by the Department of Education ('the Department') on 19 February 2020. He was at the time of the subject incidents acting as a short-term contract mathematics teacher in North Queensland. He had an exemplary teaching record.
- [2] On 27 February 2020, the Queensland College of Teachers ('the applicant', or 'QCT') received notification pursuant to s 76 of the *Education (Queensland College of Teachers) Act 2005* (Qld) ('the Act') from the Department concerning the altercation. Based on the material in the notification, the applicant formed a reasonable belief that the teacher posed an unacceptable risk of harm to children. As a result, on 13 March 2020, it suspended the teacher's registration pursuant to s 49 of the Act. On 30 April 2020, the Tribunal ordered that the suspension be continued pursuant to s 53 of the Act. There was then an investigation into the incident and an investigation report

which was provided to the applicant on 1 July 2021 pursuant to s 77 of the Act. On 4 April 2022, the Department provided further information to the applicant under s 77 of the Act. Based on the information it has received, the applicant reasonably believed a ground for disciplinary action against the respondent existed. The applicant therefore referred the matter to the Tribunal pursuant to s 97 of the Act.

- [3] At the time of the subject incident in 2020 the teacher held full registration as a teacher in Queensland. His registration is and has now been suspended for an excess of four and a half years whilst this matter could be heard and determined. That has meant he has been unable to work as a teacher and derive an income from that source.
- [4] The teacher was first initially registered with the QCT in 2009 after being granted registration pursuant to section 19 of the Mutual Recognition Bill 1992, a schedule to the *Mutual Recognition (Queensland) Act 1992* (Qld).

Legislation

- [5] Section 92(1)(h) of the Act provides as follows:

92 Grounds for disciplinary action

- (1) Each of the following is a ground for disciplinary action against a relevant teacher—
 - (h) the person behaves in a way, whether connected with the teaching profession or otherwise, that does not satisfy the standard of behaviour generally expected of a teacher;

- [6] Section 97 of the Act provides as follows:

97 Requirement for College to start practice and conduct proceedings

- (1) If the College reasonably believes, other than on the basis of interstate information, that 1 or more grounds for disciplinary action against a relevant teacher exist, the College must refer the matter to the practice and conduct body stated in subsection (2).
- (2) The practice and conduct body to which the matter must be referred is—
 - (a) for a general matter—QCAT; or
 - (b) for a PC&TC matter—the PC&TC committee.
- (3) However, subsection (1) does not apply to a matter in relation to which the College and the relevant teacher have entered into a practice and conduct agreement.
- (4) If a matter is referred to QCAT—
 - (a) the College must inform QCAT about the grounds for the practice and conduct matter and the facts and circumstances forming the basis for the grounds; and
 - (b) QCAT must conduct a hearing and make decisions about the practice and conduct matter referred to QCAT having regard to the information provided by the College.

- [7] Section 160 of the Act provides as follows: -

160 Decision about disciplinary action against approved teacher

- (1) This section applies if the relevant teacher is an approved teacher.
 - (2) If QCAT decides a ground for disciplinary action against the relevant teacher has been established, QCAT may do 1 or more of the following—
 - (a) decide to take no further action in relation to the matter;
 - (b) if the teacher's registration or permission to teach is suspended under section 48 or 49 - end the suspension;
 - (c) issue a warning or reprimand to the teacher;
 - (d) cancel the teacher's registration or permission to teach;
 - (e) suspend the teacher's registration or permission to teach for a stated time;
 - (f) make an order requiring the teacher to pay to the College, by way of costs, an amount QCAT considers appropriate having regard to—
 - (i) any expenses incurred by the College in investigating the matter; and
 - (ii) the expenses incurred by the College in the proceedings before QCAT;
 - (g) make an order requiring the teacher to pay to the College, by way of penalty, an amount fixed by QCAT but not more than the equivalent of 20 penalty units;
 - (h) impose conditions on, or amend or remove conditions on, the teacher's registration or permission to teach;
 - (i) make an order that a particular notation or endorsement about the teacher be entered in the register;
 - (j) if QCAT cancels the teacher's registration or permission to teach—make an order prohibiting the teacher from reapplying for registration or permission to teach for a stated period from the day the order is made or indefinitely;
- Note—
- See also section 350 (Decision about disciplinary action against approved teacher).
- (k) make another order QCAT considers appropriate;
 - (l) accept an undertaking from the teacher.

- [8] The hearing was conducted over two days. Despite initially being legally represented at an earlier stage of the proceeding, by the time the matter came on for hearing the respondent had to represent himself. Evidence was given at the hearing from Senior Constable Liam Burnett, a teacher whom we shall refer to as JC, a student whom we shall refer to as AO, a teacher whom we shall refer to as JK, a student whom we shall refer to as TO, and the respondent himself.

- [9] The critical issue for determination is first, whether a ground for disciplinary action has been established pursuant to section 92(1)(h) of the Act namely that the respondent behaved in a way, whether connected with the teaching profession or otherwise, that does not satisfy the standard of behaviour generally expected of a teacher.
- [10] The ground for disciplinary action in section 92(1)(h) of the Act is established when a person 'behaves in a way, whether connected with the teaching profession or otherwise, that does not satisfy the standard of behaviour generally expected of a teacher'. The expression 'standard of behaviour generally expected of a teacher' in section 92(1)(h) is not defined in the Act however we accept that it involves consideration of community and professional expectations and standards.
- [11] 'Standard of behaviour' is not defined in the Act but has been addressed by the Tribunal before. In our view, 'generally expected' means by the community and by the teaching profession; *Queensland College of Teachers v Armstrong* [2010] QCAT 709 ('*Armstrong*'); *Queensland College of Teachers v CMF (No 2)* [2016] QCAT 290 at [24].
- [12] In *Armstrong*,¹ the Tribunal said:
- ' ... the standard expected should be the standard 'reasonably' expected by the community at large, as the actions of a teacher may impact directly upon the children of the community; and this in turn should reflect the standard that those in the teaching profession would expect of their colleagues and peers.
- [13] The standard is a fluid one and informed by how the community, including the teaching profession, would expect a teacher to behave.²
- [14] In *Armstrong*, referred to above, the Tribunal also referred to the requirement that 'the welfare and best interests of children' be the primary consideration in the exercise of the applicant's functions and the Tribunal's consideration of matters concerning the teaching profession.³
- [15] In considering the expected standard, the Tribunal must have regard to the main objects of the Education Act which are:
- (a) to uphold the standards of the teaching profession; and
 - (b) to maintain public confidence in the teaching profession; and
 - (c) to protect the public by ensuring education in schools is provided in a professional and competent manner by approved teachers.
- [16] We accept that teachers are bestowed with a high level of trust by students, parents, and the wider community, and with that, an expectation that trust will not be breached. In *Queensland College of Teachers v DGM* [2018] QCAT 194, the Tribunal said:
- Teachers hold a special position of trust arising from the nature of their work. In particular, teachers exercise powers that have a significant impact on the lives of students. How teachers behave towards a student may influence that

¹ [33].

² *Queensland College of Teachers v PPK* [2019] QCAT 59.

³ *Armstrong* at 34-36 and section 233 of the Act.

student for life. Consequently, there is a community expectation that these powers will be exercised appropriately.⁴

[17] We accept that there is a power imbalance between teachers and students by virtue of a teacher's position, disparities in age, maturity and life experience, and the inherent vulnerability of young people.

[18] In *Queensland College of Teachers v PPK* [2019] QCAT 59, the Tribunal found that:

In our view there is a difference in power and authority between a teacher and student and generally a high level of trust placed by the student and their family in the teacher. There is also an expectation by the student and their family that the teacher will behave in a way generally expected of a teacher. This trust and expectation exist not only where the student is an immediate pupil of the teacher but more generally, by reason of the fact that the person holds the position of teacher. We are also of the view that the differences in power and authority which exist create an imbalance between the teacher and student ...⁵

[19] We accept and apply those principles here.

[20] If a ground for disciplinary action has been established the issue arises as to whether the appropriate sanction is, as the applicant contends, cancellation of the respondent's teacher registration pursuant to section 160(2)(d) and a prohibition on the respondent from applying for teacher registration or permission to teach for three to five years from the date of the suspension of his teacher registration (which occurred almost four years ago on 13 March 2020).

[21] The third issue is whether to accept the applicant's contention that if a ground for disciplinary action has been established there ought to be an order that there be a notation on the register of teachers setting out the pre-requisites for any future application for registration or permission to teach.

[22] Finally, there is the issue of whether a non-publication order is necessary, provided there are exceptions for information sharing required to protect children and to allow the respondent to meet his disclosure obligations.

The Human Rights Act 2019 (Qld)

[23] An issue which was not touched upon at any stage of the disciplinary process, nor by the applicant in the proceeding here, is whether there are any relevant considerations under the *Human Rights Act 2019* (Qld) (the 'HR Act').

[24] The 1966 International Covenant on Civil and Political Rights ICESCR Article 6 states that "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right". This right is not one specifically protected under the HR Act. In the ACT section 27B of the *Human Rights Act 2004* (ACT) says that: "Everyone has the right to work, including the right to choose their occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law". There is no Queensland equivalent to Section 27B of the Human Rights Act 2004 ACT.

⁴ *Queensland College of Teachers v DGM* [2018] QCAT 194 [34].

⁵ *Queensland College of Teachers v PPK* [2019] QCAT 59 at [14].

- [25] The original decision to suspend this Teacher set out in a letter to him of 13 March 2020 did not consider or say that the decision maker had considered whether the decision was compatible with section 8 of the HR Act.
- [26] The decision in *Johnston & Ors v Carroll (Commissioner of the Queensland Police Service) & Anor; Witthahn v Wakefield (Chief Executive of Hospital and Health Services and Director General of Queensland Health); Sutton & Ors v Carroll (Commissioner of the Queensland Police Service)* [2024] QSC 2 (the ‘*Wakefield decision*’) held that Section 58(1) of the HR Act imposed two obligations on a decision maker acting under statutory power in that case:
- (a) Substantive: not to make a decision in a way that is incompatible with human rights (section 58(1)(a)); and
 - (b) Procedural: not to fail to give proper consideration to a relevant human right in making a decision (section 58(1)(b)).
- [27] There is a question whether it has been demonstrated that the Tribunal should cancel his teacher registration having regard to the express terms of section 58 of the HR Act, that decision makers including this Tribunal:
- (a) understand in general terms which of the rights of the persons affected by the decisions might be relevant and how those rights would be interfered with by the decision;
 - (b) have seriously turned their minds to the possible impact of the decision on a person’s human rights;
 - (c) have identified the countervailing interests and obligations; and
 - (d) have balanced competing private and public interests as part of the exercise.
- [28] As Justice Martin said in the *Wakefield decision*, the ‘proper consideration’ that needs to be given under sections 58(1)(b) or 58(5) engages a standard of consideration higher than that generally applicable at common law to taking into account relevant considerations. As decision makers this Tribunal is also charged with the same duty.
- [29] The HR Act applies to courts and tribunals when they are performing functions that are relevant to the rights protected under the Act. This includes both the judicial and administrative functions of courts and tribunals. Judicial functions include the work courts and tribunals do in hearing cases and handing down judgements. Examples of the human rights that will apply to judicial functions include equality before the law and the right to a fair hearing.
- [30] The HR Act requires that all legislation is to be interpreted in a way that is compatible with human rights, to the extent that is consistent with the purpose of the legislation. If legislation cannot be interpreted that way, it is to be interpreted in a way that is most compatible with human rights, to the extent that is consistent with purpose of the legislation.
- [31] ‘Compatible with human rights’ means the provision does not limit a human right, or limits a human right only to the extent that it is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality, and freedom. The Act sets out factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

- [32] The HR Act protects the Right to Property (section 24). 'Property' is not defined in the HR Act. The right was modelled on Article 17 of the *Universal Declaration of Human Rights* but has received the most consideration in the form it appears in *Article 1* of the First Protocol to the *European Convention on Human Rights*, the right to 'peaceful enjoyment' of 'possessions'. That right has been limited to existing possessions and not future acquisitions or future income: *Malik v the United Kingdom* (2012) ECtHR, Application no. 23780/08 at [81], [88] and [93] ('*Malik*'). However, the goodwill associated with a right to practice one's profession is capable of protection: *Malik* at [81], [89]-[93]; *Holder v Law Society* [2003] 1 WLR 1059, so too a licence to trade: *Malik* at [91] and the authorities cited therein.
- [33] There is case law authority which demonstrates that interferences with licences or permits to operate a business or carry out regulated activities such as serving alcoholic drinks, taxi-driving, or owning a firearm may breach the licence-holder's (or respondent's) property rights, which are essentially the economic interests connected with his chosen profession.
- [34] At the time the applicant was an employee of the State but as a teacher he might also be engaged by private schools as an independent contractor.
- [35] There appears not to have been any decision which treats the opportunity to earn an income from being authorised to teach in schools as a protected property right, however, it is at least arguable that the loss of his teacher registration in this case could be regarded as affecting the applicant's protected property rights and that is a matter to be taken into consideration.
- [36] In the end we do not need to decide this issue and do not do so.

Background

- [37] On 3 February 2020, at about 2 pm, a female 14-year-old ninth grade student who we shall refer to as 'the student' was attending a maths class at a State school ('the school'). The class was being conducted by the respondent. He had not taught the student before and at the time he did not know that he had any previous experience in dealing with her, although after the events of that day he came to realise that he had previously had a verbal altercation with her in the library involving racist comments made to him by the student and other students with her. Later when attempting to explain what happened on the critical day he came to see that earlier incident as partly explaining how the student treated him that day.
- [38] During that class the respondent was teaching a class when an altercation occurred between the respondent and student as a result of which police attended and conducted an investigation, which included interviewing the student at a hospital after the event.
- [39] The respondent's employment was suspended with full pay by the department on 19 February 2020.
- [40] As has been mentioned earlier in these reasons, on 27 February 2020, the applicant received a notification pursuant to section 76 of the Act from the department alleging that the respondent had acted physically inappropriately towards the student. The alleged conduct was classified by the department as a 'serious incident' which occurred while the respondent was employed on a temporary contract (or so-called tracer teacher) while a registered teacher at the school.

- [41] The applicant formed a belief that the respondent posed an unacceptable risk of harm to children and, on 13 March 2020, suspended the respondent's teacher registration pursuant to section 49 of the Act.
- [42] On 20 April 2020, the respondent's temporary employment with the department ceased.
- [43] On 13 March 2020, the suspension matter was referred to this Tribunal to decide whether to continue the suspension (case number: OCR076-20). On 30 April 2020, a member of the Tribunal ordered that the suspension of the respondent's teacher registration be continued. Reasons were given for that decision which referred to allegations of a "physical altercation with a female student, which included punching and kicking the student and pushing her to the ground".
- [44] The QCT referred this matter to the Tribunal under section 97 of the Act by application filed three years after the subject incident, on 27 March 2023.
- [45] As has been mentioned earlier in these reasons, the Tribunal is conferred with jurisdiction to deal with the matter by Section 9 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) and sections 93, 95, 96 and 97 of the Act.

Consideration

- [46] The applicant concedes that the standard of proof that it must meet is the civil standard, applying the principles to be derived from the decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 ('*Briginshaw*'). Hence the Tribunal must decide whether it is satisfied, on the balance of probabilities, that the allegations against the respondent have been made out, having regard to those principles.
- [47] The applicant refers to what was said in *Queensland College of Teachers v XYZ* [2019] QCAT 283, at [41], where the panel said in this context:

The *Briginshaw* approach is based on the principle that a court in a civil action should not lightly find that a party has engaged in criminal conduct. The standard of proof does not vary - the civil standard remains the applicable standard. However, in applying the *Briginshaw* principles we must proceed cautiously in light of the gravity of the allegations made against the respondent and we must be satisfied that the relevant evidence has a high probative value, commensurate with the seriousness and the consequences of the alleged conduct.

- [48] Actually, the principles apply to not only allegations of criminal conduct, although we have here such an allegation in that assault is alleged. *Briginshaw* solely concerned proof of adultery in divorce proceedings. However, *Briginshaw*'s later application was not so limited. Beginning with the High Court's unanimous application of the principle to murder allegations in *Helton v Allen*,⁶ it was applied to a broad range of allegations including fraud, discrimination workplace and sexual misconduct,⁷ but also to other kinds of serious allegations.

⁶ (1940) 63 CLR 691, 696 (Rich J), 701 (Starke J), 711–12 (Dixon, Evatt, and McTiernan JJ).

⁷ See, eg, *Rejcek v McElroy* (1965) 112 CLR 517, 521 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ). See, eg, *Department of Health v Arumugam* [1988] VR 319, 331 (Fullagar J); *Sharma v Legal Aid (Queensland)* [2002] FCAFC 196, [40] (Heerey, Mansfield

- [49] The well-known principles to be derived from the decision in *Briginshaw* as to what is the proper method for the application of the civil standard to proof of facts were conveniently summarised in *Leigh v Bruder Expedition Pty Ltd* [2020] QCA 246 at [16], where Sofronoff P (as he then was) stated:

Dixon J said that the application of the civil standard to proof of facts was not a mere mechanical comparison of probabilities. Rather, the fact finder must feel an actual persuasion of the occurrence of the relevant fact before its existence can be found. An opinion that a state of facts exists may be held according to indefinite gradations of certainty. However, except in criminal cases, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. Reasonable satisfaction on the balance of probabilities is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. His Honour said:

"This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based upon a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained".

- [50] One of the issues that arose early during the hearing concerned the scope of operation of section 97(4)(b) of the Act which provides that the Tribunal must have regard to the information provided by the applicant. That is a reference to the information provided under section 97 of the Act. There is a tension between what is said in section 97(4)(b) of the Act, and the duty of this Tribunal to hear and determine the issue of whether the teacher has behaved in a way, whether connected with the teaching profession or otherwise, that does not satisfy the standard of behaviour generally expected of a teacher. This is not a review application. It is not our task to determine whether decisions made by the applicant or anyone else for that matter, are valid supported, ought to be upheld or set aside.
- [51] Counsel for the applicant was unable to refer us to any authority which dealt with the scope of s 47 or any analogous provision. The applicant's written submissions did not address the issue of what the scope of s 47 is. That the Tribunal must have regard to the information provided by the applicant does not, in our view, mean that it is sufficient simply to curate and then tender all the material that has been uncovered in the investigation conducted by the applicant or indeed others like the police by exhibiting it all to affidavits by persons with no direct knowledge of anything in that material, such as was attempted in this case. Here there were many so called statements by various teachers and students as to what they say happened. In fact, they were not statements at all but transcriptions made by a person who was not called as a witness and who may or may not have accurately recorded what those witnesses told him happened. In only a few cases, amongst the many eyewitnesses to the events

and Hely JJ); *M v M* (1988) 166 CLR 69, 76–7 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *S v R* (1999) 149 FLR 149, 173 [109] (Kay, Holden and Mullane JJ); *Amador v Amador* [2009] FamCAFC 196, [47] (May, Coleman and Le Poer Trench JJ).

in question, were those direct witnesses called to give any evidence or made available for cross examination despite the respondent's insistence that they be made available. Critically, the applicant did not summons the student involved in the altercation to call evidence; it did not call her, it did not make her available for cross examination and there is no evidence from her apart from what she told police in a recorded interview after the incident. A version of events she gave a teacher was not relied on by the applicant. It expressly disavowed reliance on it, although it is amongst the material to which we must have regard.

- [52] In our view, having regard to the seriousness of the allegations, and what is required of us, that we must be satisfied that the relevant evidence has high probative value and that we have a high degree of persuasion as to what occurred, it would be a rare case where hearsay or secondary accounts of what occurred, other people's opinions or findings as to what occurred, or untested assertion by persons unwilling or unable to be called to have their evidence tested, if controversial, would enable findings to be made based on application of the principles to be derived from the decision in *Briginshaw*.

The events of 3 February 2020

- [53] The student's full name is set out throughout the evidentiary material as well as in the written submissions of the applicant. However, having regard to the fact that she was a minor at the time of the incident, we do not consider it to be appropriate or necessary to identify her by her name in these reasons.
- [54] The student gave an oral version of the incident to a teacher, JK who wrote it down sometime after the incident occurred. The applicant did not seek to rely on that version of events, although it is in the material referred to us and to which we are to have regard, and we will have regard to it. It is instructive to compare it with the version given to the police the same day, and which was recorded on camera.
- [55] In the statement JK recorded, the student is attributed with having said;

I was talking to (a certain other student) and I didn't have a book or pen, I got a warning from Sir, Then I called him The Lorax. I got another warning. Then he asked me to move and I didn't want to.

Then he asked me to go outside.

I started to go then went back to check the time on his laptop. He came and stood in front of me and had his face close to my face.

He started pushing me with his hands on my shoulders. He said "you're a silly little girl", I said "I'm taller than you"

He started yelling and using swear words, I said 'your breath stinks'.

Then I walked out to go to the office, I decided to go back and get my phone. I knocked on the door and opened it.

He stood in the doorway and pushed me on the chest. I said "Sir, I want to get my phone".

He pushed me and I pushed him back. He punched me on the jaw and I hit him back.

Then he punched me on the lip and pushed me to the ground. I hit my head on the concrete.

He kicked me in the face when I tried to get up and kept trying to hit me.

I tried kicking him to get him away.

He stopped when a teacher came over.

- [56] It is noteworthy that in that version of events, the most contemporaneous version she gave, she does not mention her as punching him except when she “hit him back” and does not mention intentionally kicking him in the testicles. On this version he was the first one to make physical contact. In her interview with police, she accepted she was the first one to make physical contact, by pushing him at the doorway.
- [57] In the two interviews the police conducted with the student, which were recorded by the officer’s body camera and audio, she gave significantly different versions to that given to the teacher, JK.
- [58] In the earlier video, which was in an outdoor area of the hospital, she said she got two warnings. One for not having a book and pencil and the second because she called him the Lorax because he kept yelling at her. He told her she was talking but she was doing her work. Then he told her to move, to which she said there is nothing wrong. That short interview ended and they went inside to a more private area.
- [59] The content of the longer police interview was not transcribed either and the audio is of poor quality. The applicant’s written submissions do not refer to what she said except at a very general level.
- [60] The Police said that she had said she was in class and was given two warnings. She then went on to say a number of things which we will summarise in what follows (doing the best we can with the poor quality of what was recorded and interruptions to what was being said).
- [61] She said she was in class talking and the teacher told her to move to a different desk within the class. She claims to have been talking about the work and she said no, she would not move to a different desk, and told him why. He then told her to get out of the classroom. She claims to have been complying with this but then realised she left her bag and her phone in the class room. And she also realised (for reasons which she did not explain) that she needed to look at the time at or on the computer on the teacher's laptop on his desk.
- [62] Later, witnesses suggested that she actually went there and disconnected his laptop. No doubt her phone would have helped her know the time without the need to go to the teacher’s desk where he was situated. We have no doubt that she went to the laptop to interfere with it because it was his property, not to ascertain the time.
- [63] She went on to say to the police that, whilst still within the classroom, the teacher came up to her face and started and pushing and shoving her, and then she walked out having seen the time on his laptop.
- [64] We pause to note that there is no objective evidence or any version of events from any of the other students in the class who were watching this that any pushing occurred at that stage before she left the classroom. The objective evidence of other witnesses, which we accept, is that there was no such pushing or shoving within the classroom by that time or at all.

- [65] She then said to the police that after leaving the classroom she went to come back because she wanted to get her phone and her bag. She alleges that as she attempted to re-enter, he started shoving and pushing her out the door and then she shoved back because he was shoving her. She says that he then punched her in the jaw and indicated the right side of her face in the video.
- [66] She then said to the police that she then punched him back with her left hand and he then punched her on her lip. He pushed her onto the ground and then she started swinging. She says that she tried to get back up and then he kicked her in the face.
- [67] She was then asked what else happened, to which she replied that her mind had gone blank and then said that she had tried kicking him away and then tried to “kick him in the nuts” to get him to stop. Then she tried to get back up.
- [68] It is noteworthy that she did not say that she actually did manage to kick him in the testicles.
- [69] After she said she attempted to kick him, she said to the police she tried to get up and he kicked her in the face. She then said to the police that her mind was blank about what happened after that, but then went on to say that she “kicked him in the nuts” to get him to stop and then he kicked her down and kept swinging and swinging and then he saw a teacher and the students were coming and he stopped.
- [70] Later in the interview, she explained that she had not brought books or pencils to the class and this was due to some family problem, which she did not explain.
- [71] She then said to the police that whatever happened inside the classroom did not involve them having “arguments”.
- [72] When the police put to her that other witnesses said that she was the one who struck first, she did not deny this, but said that he was up in her face and that she had said to him that his breath stinks, although she did not punch him first, he punched her first. She accepted though that she touched him first. She was the first person who engaged in any pushing, and she says he was right in his face when she pushed him.
- [73] Two other significant things occurred during the course of that interview. First were the evident interventions by her mother showing her to have an active role in developing the narrative around what had happened and seeking to have a say in what happened and how serious it was. At one point she was seeking to coach her daughter to say that the teacher had called her disgraceful racist and sexist names and used the particular words he is supposed to have used and suggesting what she should say were the words used. The student did not adopt any of those suggestions.
- [74] The other significant thing that occurred was that when the police suggested to the student that she might herself be charged with assault as the person who initiated the contact, she wanted to know whether if she had done it in fact, she would be excused because she was a minor.
- [75] Although this matter had been set down for a hearing with considerable notice as to the hearing dates, the applicant was in no position to call the student or her mother who was a person to whom the student seemingly reported the incident. No witness statement from her was obtained by the applicant. She was not apparently contacted at all by the applicant to have her available to give evidence as to what occurred.

- [76] It is a most unsatisfactory state of affairs that the person on whom the alleged act of inappropriate behaviour by a teacher was perpetrated was not called and no adequate explanation was given why she was not called apart from the assertion from the Bar table that the College had not been able to get in contact with her. What attempts were made to do so and when these were made was not explained to us. No application was made to the Tribunal to have a summons issued for her attendance to be compelled. Nor is there any explanation for not calling the student's mother, to whom the student had apparently first reported the incident.
- [77] Evidence from one of the officers who was present, Senior Constable Burnett, was to the effect that the police also interviewed others.
- [78] In the end, the student and her mother made no formal complaint to the police, and this led to no charges being brought against the respondent. Furthermore, the police observed that the student was showing no injury of any kind and in particular, no injury to the upper body or head or face consistent with being kicked with any force. There is no medical evidence from any person at the hospital, which suggests that she neither suffered any injury or complained that she suffered any injury. The police report observed that the child appeared uninjured, although there is some suggestion that she said she had a sore jaw; however, there is no medical evidence consistent with her having a sore jaw. There can be little doubt, however, that in the course of what occurred that she might have suffered some kind of injury.
- [79] The police report was described as a "child harm referral report" and was made at 5.53 pm on the day of the incident, based upon the interviews and other investigations conducted, and stated that the student's mother was in an agitated state during the interview at the hospital and that it was difficult to get a clear version of events from the child as the mother kept interjecting, defending her daughter's actions. As we have noted, during the course of the interview with the student, the mother clearly at one point invited the student to accept that the teacher directed serious racial insults at her. To her credit, the student declined to adopt that suggestion.
- [80] During the interview, the student referred to some discussion between her and the teacher referencing who was taller or shorter than the other. That is consistent with some other evidence given by others about verbal barbs that they were giving each other and amongst those included a statement by the student that his breath stank.
- [81] A comparison of what she told the police with what she said to teacher, JK reveals many inconsistencies. These include that the incident started when she was just talking to another student and that she did not have any books or pens and was not doing any work. She did not tell police that she had insulted him by calling him the Lorax and that after she was warned several times, she was asked to move and then eventually asked to go outside. She did not tell police that they were then close to each other and he had his face close to hers, calling her silly and saying that he was taller than she was and yelling and using swear words.
- [82] No other student or teacher witness gave evidence or a version of events in which the teacher used swear words towards the student.
- [83] JC was a teacher at the school who observed the incidents that occurred outside of the classroom but was not present for what led up to the relevant incident within the classroom. The applicant submits in its written outline that JC saw part of the altercation. On the contrary she was the only one who was an eyewitness to what

occurred outside the classroom, which was where the altercation occurred. We consider that her evidence carries significant weight for that reason. She gave some kind of statement or version of events to another staff member shortly after the incident. In that statement she said that she saw that the student was on the ground punching the teacher. The teacher was pushing the student and the teacher was deflecting punches and the student was fighting back.

- [84] She said that both were on the ground when she first saw them and they were punching each other. She describes both the student and the teacher as being aggressive. She said that she heard the teacher saying to the student “go to the office”, but the student was not answering. The statement ends with her saying that after the student was not answering. JC asked if they were all right, and the teacher walked away back to the classroom.
- [85] The student spoke to JC and told her the student’s name and that she wanted to get her phone and JC observed another student got the phone for her. JC said that the student involved in the altercation was angry and then started crying and said she was going to call the police. She said in her statement that she initially thought it was some kind of karate presentation, based on what she could see they were doing.
- [86] It is noteworthy that she did not observe either party as kicking the other, although she was the only eyewitness to the event outside the classroom who did not have the view obstructed by the classroom door being closed, albeit that there was a narrow glass panel within the door that allowed for some visibility of what was occurring beyond the door on the concrete pavement outside.
- [87] In her oral testimony, JC swore that she was in the concreted area outside of the classroom and observed the both of them on the ground, punching each other with the teacher deflecting punches using blocking actions and that the punches were coming from the student. She said there was no one else around and that she stood there for a little while. She said that the classroom door was further away from where the incident was occurring and that the door to the classroom was shut. There were two adjacent classrooms in the area.
- [88] She swore that from her observations, both of them were on the ground the whole time and she did not see anyone kicking anyone, but they were each punching each other. She said, however, that she saw that the child was punching the teacher and he was pushing her back deflecting the punches. She continued to punch the teacher and then he started punching her back, and that they were then both punching each other. She said that this punching could have been deflecting punches off each other.
- [89] The whole incident, she said, the occurred over the space of about two minutes.
- [90] JC was an independent and impartial witness and we accept that her evidence is reliable in its description of the student as the initiator of the punching, rather than the teacher. We accept her evidence that she saw that the child was punching the teacher and he was initially pushing her back, deflecting the punches but that the student continued to punch the teacher and then he started punching her back and that after that they were both punching each other.
- [91] There is other objective evidence, including from the respondent himself, that there was kicking involved in the incident.

- [92] Although JC did not see that occur, the inference to be drawn is that although she was present, she was unable to see it because what was going on was a short but furious engagement where both parties were pushing punching and throwing blows of various kinds. The fact that she did not see the teacher kick the student after he had been kicked in the testicles is perplexing because it seems clear on all versions of events but that kicking from the two of them did in fact occur. No doubt the whole event was confronting.
- [93] There was an undated handwritten incident report from a student, AO. She also gave oral evidence. She presented in general as an impartial and honest witness, albeit with a flawed recollection of events. She described the incident as one in which the student and the teacher got into an argument about schoolwork. He walked to the front of the class. He told her to leave and she said no. He told her this about three times with the student refusing each time. She suggests the teacher got angry although she does not describe what provoked this and he yelled at her to get out. The teacher got close to her face and he said to her “stop touching me”. The student said “what are you going to do about it?” He yelled at her to get out again. And this time she did, but came back in to get her phone. And he blocked the door saying “what are you doing?” She replied, “I need to get my phone” and she began arguing with him. He refused to allow her inside and punched her. She said “Don't touch me” and tried to come in again and he pushed her again, even harder.
- [94] She swung at him, hitting him, and then he punched her so they were both fighting outside the classroom. Then he came behind and put her in a headlock. She fell to the ground on her back. She was on the ground so he kicked her in the face. She suggests that the students were yelling and telling him to get off her but he kept on going.
- [95] The content of the witness AO's written statement was in many respects, significantly different from the evidence that she gave before us. For example, in the evidence before us she was clear that the student initiated the physical contact apart from when the teacher sought to block her entrance back into the classroom. She accepted that at no time prior to when the student exited the classroom after the verbal altercation was there any physicality of any kind apart from the teacher speaking in a loud or strong voice, insisting the student leave.
- [96] She swore that the first physical act apart from the teacher seeking to prevent her re-entry was the student giving him a hook punch to the face. That punch led to the headlock or holding of the student and her falling to the ground. While on the ground, with the teacher partially holding her and standing above her, the kicking was initiated by the student who was thrashing and throwing her arms and using punching motions and kicking with her legs. The first real contact occurred when the student kicked him between the legs in a way which the witness AO conceded was an intentional, aimed kick to the testicles in some way intended to get him away from her.
- [97] The student AO then has the incident of the teacher kicking the student as occurring after he himself was kicked between the legs and rather than being kicked in the head or the face, as she put it in her statement, AO conceded that he kicked her to get her off him and kicked her in an area at or above the student's shoulders.
- [98] She also conceded that there were insults handed to the teacher by the student at the initiating stages, including that she would “roll the teacher”. In other words, punch him. But the witness suggested that this was used in a slang way as if the student was saying, no, I am only kidding or joking. The teacher swore that words to that effect

were used and that he took them seriously as a threat of violence. It is noteworthy that the student gave no version in her statement which suggested she made any such statement.

- [99] It was put to student AO that the student had been using shaking fist movements in the classroom during the verbal altercation, and that one of the students had said to her not to do it, as if to suggest that she was facing up for a physical fight with the teacher. She did not specifically recall this as having occurred.
- [100] One concerning feature of this that the witness AO conceded, in cross examination for the first time, was that the classroom had an automatic closing door which provided almost no or very limited visibility through a small glass panel on that door to the fight going on outside it. She could not adequately explain how she could see all of those things which she said she saw on the other side of that door through that small glass panel; however, we accept that she was able to see some of the incidents that were occurring.
- [101] There is a considerable disparity between what she said in her statement about how the kick occurred and the seriousness of the punch that was thrown at the teacher to initiate the violence. What she said about this in her oral testimony, which we accept, painted a rather different picture to that presented in her statement and clearly placed the initiating punch as one by the student and the initiating kicking exercise also by the student.
- [102] JK (then Head of Student Services at the school) prepared a written statement on the day of the incident and gave oral evidence. She was involved with the student and her friend following the incident and took a version of events from the student that we have referenced already. Her evidence was that JC, the special education teacher, came to her office and told her that a teacher and a student were fighting. JC took her to room LC3 and pointed out the student, who was talking with another student, TH. The student was talking on her phone and seemed upset. As she approached, the student threw her phone on the ground, smashing it. The student was crying and yelling and said that a teacher had assaulted her. JK took the student and the other student TH to her office. She observed that the student was crying, shaking and holding her jaw. She stated that the respondent had hit her in the jaw and lip. She was having trouble speaking and her jaw was hurting. The student also said she thought her fingers were broken.
- [103] JK said in her oral testimony that the student seemed to be in a lot of pain and she felt that she needed medical assistance. Eventually, an ambulance was called and the deputy principle wanted to interview the student to take her statement after JK had taken it. It seems that the ambulance did not in fact, take her to the hospital. She was not having trouble speaking when the police interviewed her and she did not say her jaw was hurting. The student also said nothing to the police about thinking her fingers were broken. There is no medical evidence that supports the conclusion that she was in a lot of pain and needed medical assistance or received any.
- [104] During cross examination, the respondent suggested to JK that he was never angry during the course of his encounter with the student and that he never lost control. Although JK was not there to see what had happened, she thought it appropriate to disagree with these propositions. She accepted that the respondent might have been using accepted control methods for controlling a classroom when he did some of the

things he did that day. He suggested that he was defending himself and that he would do the same thing again in the same situation.

- [105] For reasons that we will explain shortly, it is that he has taken this position that he would do the same thing again and in particular, the critical kicking of the student as something he would do again in the same situation, that has had the most significance in our determination of how to treat his conduct and what disciplinary outcomes ought to follow.
- [106] TH was another student in the classroom that day. She gave a version of events to the teachers after the incident. She was not called to give evidence and not made available for cross examination even though it was made clear that her evidence was controversial. For that reason, we treat what is in her statement with caution.
- [107] Student TH stated that as she walked back from getting a drink, she saw the respondent come out of the classroom telling the student to get out of the room and he was yelling loudly. She observed the respondent push the student in the shoulder to get her away from the classroom, which she had been trying to re-enter. The student said, "Don't touch me," and "went to hit" the respondent in the face, and he pushed her on the chest.
- [108] Student TH stated that they "started going for it." She observed the respondent punch her on the side of the face and the student kick him in the groin. She then observed the respondent grab her hands cross them behind her and put her on the floor. The student kicked the respondent in the groin from the ground. She then observed the respondent step back and, "like a soccer move", straight-kicked her in the face.
- [109] The latter evidence, that he acted like one would perform a soccer move and straight-kicked her, was acted out in the hearing room by the respondent as something he indeed did. He disputed kicking her in the face intentionally or otherwise but suggested he intended to kick her, but misjudged it and connected in a way he did not intend.
- [110] TO was another student in the classroom that day. She gave a version of events to the teachers after the incident. She was called to give evidence and made available for cross examination. Initially her evidence was inconsistent with what she has said in her contemporaneous statement in that it suggested the teacher threw the first punch but she resiled from that later. She made clear that her view of what happened outside the classroom was blocked. In her statement she said:

The Teacher went to (the Student) to get out of the room. He was calm.

The Student was quiet. She went to front of classroom and refused to go outside.

He stood up to her face and was 2 inches away and yelled "Get out " It was intense. The Student said "What are you going to do about it." He kept yelling.

The Student pushed his chest to back him off. This was not hard.

He said 'Get out!' The Student said, "Sir you breath stinks."

The Student left room. Teacher shut door. She returned to get phone. The Student said "Sir can I get my phone."

He said "No, I don't want to see your face." At the door, he shoved on the shoulder. The Student moved backwards.

I don't know who hit first. I saw teacher swing his arm to punch her. I thought he missed.

She was fighting back.

I overheard someone say, "He kicked her." - The class was standing up. (Another student) ran to next room and told that teacher to come and help. That teacher checked that ever thing was okay.

(emphasis added)

[111] According to that version, the student started the pushing and it is not clear who started the punching. Someone saw him kick her but not the witness TO. On this witness's account, which we accept, nothing inappropriate occurred on the part of the respondent until the student tried to come back into the classroom to get her phone after leaving it.

[112] Another student, SJ, wrote a version to one of the teachers on the evening of the incident saying:

[The teacher] got upset at (the Student) at her desk but I'm not sure what (the Student) was doing that made him upset. [The teacher] went back to his desk and followed. [The teacher] went up to (the Student)'s face and told her to Get Out, and their faces were really close and he was screaming in her face to Get Out.

The Student said she wouldn't leave and he kept telling her to get out.

After that she shoved him to walk away and said "Sir you're breath stinks" [sic] and walked out of the classroom.

After she went out of the classroom, she came back in and said she wanted to get her phone at the doorway and the teacher wouldn't let her past and she tried to get past but then he pushed her out the door.

I only saw when he pushed her out the door and not any fighting. But while they were fighting, some girls (H is the only girl I can remember and 2 or more other girls) told the teacher to get off of the Student. By this time, another teacher was walking and saw it happening.

[113] Again, this version does not support what the student told police had occurred. He seems to not have observed the respondent punch her or initiate violence. He has the student initiating the pushing, as the student eventually conceded to the police she had done.

[114] Another student who was not called to give evidence or be cross examined, LM, wrote a version to one of the teachers saying;

I think (the Student) was swearing to teacher's face.

Faces were close together.

(the Student) ran out of the classroom, or refused to move, she wanted her phone.

Teacher pushed her out of the room on her shoulders.

I saw (the Student) on the ground, trying to get away from the teacher. Her legs were moving in the air.

I could see both using hands to push at each. Much yelling and swearing.

(the Student) came in and unplugged his laptop.

- [115] Again, on this witness's account, which we accept, nothing inappropriate occurred on the part of the respondent until the student tried to come back into the classroom to get her phone after leaving it. It also corroborates the respondent's claim that the student came in and unplugged his laptop after the incident outside the classroom, and despite claims that she was in some way traumatised, was able to engage in further provocative activity.
- [116] JG, another student who was not called to give evidence or be cross examined, gave a version in which it was said that she observed the student refusing to do work after being asked by the respondent. They then got into an argument and the student was swearing at him. She heard the student say to him, "wanna get rolled?" and the respondent replied, "yes, since your (sic) such a big girl" and they were then "in each other's faces". The respondent escorted the student out of the classroom while still arguing. The respondent began teaching again and the student attempted to come back in the classroom and they began arguing again. She was then asked to leave again and refused to go when she got to the doorway, and the respondent pushed her out. The student pushed him back and the respondent "raised his fist and hit her". Student JG then observed the student on the ground kicking out. The respondent was pushing her legs away and student JG started to walk away from door when he observed the respondent kick the student. Another staff member came to the classroom and the respondent continued to teach.
- [117] Again, on this witness's account, which we accept, nothing inappropriate occurred on the part of the respondent until the student tried to come back into the classroom to get her phone after leaving it. It also corroborates the respondent's claim that the student threatened to roll i.e. assault him.
- [118] Another student, FG, who was not called to give evidence or be cross examined, gave a version in which it was said that she observed the respondent and student have a "physical fight outside the classroom". She observed the respondent push the student to the floor and witnessed him pulling her hair. Student FG stated that the student was crying and later called her and told her that she was in pain and her head was in pain. She observed the student and the respondent arguing before the incident because the student was talking to another student and not doing work after being told to by the respondent. The respondent was "really angry" after the student told him to calm down.
- [119] This version introduces elements that few other witnesses refer to, including the suggestion of him pulling her hair and her crying as well as the notion that the respondent was "really angry" after the student told him to calm down.
- [120] Another student, HK, who was not called to give evidence or be cross examined, gave a version in which it was said that she observed arguing between the student and the respondent as the student did not want to leave the classroom. She observed they were, "Up in each other's faces". Student HK observed the respondent push the student out of the classroom and a fight started. She observed the student on the ground crying and also observed the respondent kick her in the face when she was on the ground. Student HK observed the student hit the respondent, him block it, hit her and grab her neck and she fell to the ground.

- [121] This version introduces the element that the student did not want to leave the classroom. And they were within the classroom "Up in each other's faces" and that the respondent pushed the student out of the classroom and a fight started. It is devoid of many other elements that others say occurred.
- [122] Another student, TK, who was not called to give evidence or be cross examined, gave a version in which it was said that the student wouldn't go outside when she was asked to by the respondent and she told him to "fuck off." The respondent became angry and started yelling at her. The student went outside and came back asking for her phone so she could call her mum. Student TK stated that the respondent told her no and to get out of his face and he didn't want to see her. The student told him, "No" and that she wanted her phone. The respondent then pushed her "really hard out the door" and she pushed him back. The respondent "swung at her and hit the side of her face" and swung back and missed. The respondent then pushed the student to the ground and started kicking while she was trying to grab his legs to stop him.
- [123] This version makes no reference to her kicking him first and had him doing the first swinging punch rather than the student. The suggestion that she told him to "fuck off" is unique to his version. He has the respondent doing the first of the pushing where others say it was the student who started the pushing. He makes no reference to her saying she would roll him.

What is the respondent's version of events?

- [124] The respondent gave an undated handwritten version of events shortly after the events in question. It said:

I was teaching the class normally and was moving around the room, making sure students were on task. I repeatedly had to return to 1 student that was not cooperating at all. Each time I asked her to do her work she would mutter under her breath something rude like "go away" or "don't tell me what to do".

Her friend would say to her don't do that. I ignored the behaviour, hoping she would take her friend's advice."

"Her behaviour got worse and worse, and she was starting to yell out and disturb others. I then asked her to go to a buddy class next door. At this point she got very angry and swore at me many times including "fuck you cunt", "you can't tell me what to do you Lorax looking motherfucker" and many more I can't recall.

At this point I just asked her to leave the room. She came up to me and yelled in my face and threatened me "I will fucking kill you" followed by many swear words.

I yelled back at her she would have to leave and walked her to the door and she left and I closed the door after telling her to go to the office.

- [125] The student yelled at the respondent that she was coming back. The respondent stated that he feared for everyone's safety and moved to the door and blocked her path. The student is alleged to have pushed the respondent in the chest to try and get past, but the respondent pushed her away.
- [126] The respondent's statement continues,
- She then came back at me punching me twice in the face and many other blows. I pushed her strongly away and she came back to attack again. restrained her

arms and dropped her to the ground and told her to stop." "At this point, (the student) went wild, kicking and punching from every angle. I took many blows, but when she up-kicked me flush in the testicles, I kicked her back as the only way to get away and finish the situation.

Two other teachers/staff had arrived at this time (unknown). The student left, and I went back to teach the class.

I was talking to staff outside when she returned again, pushed past me and another staff member saying, "I'm going to smash that fucking laptop". I took the laptop away from her at which point she said, "I'm going to get my mother and she is going to fuck you up!

- [127] The respondent sought to distance himself from this version when he gave evidence, suggesting he was not focussed at the time he gave it and that it was not reliable.
- [128] Two years after the incident the respondent provided a written response during the show cause process on 21 March 2022.
- [129] The respondent stated in the 21 March 2022 letter that the student entered the classroom and started talking to her friends. He stated that all students were working except for the student "who was fluctuating between staring at me strangely and [talking] to her friend." When he asked her to start working and if she needed help, the student "started to rotate her firsts." The respondent took this as an aggressive signal. The respondent told the student if she did not start working, he would have to send her to another classroom.
- [130] He stated that she then became aggressive and heard one of her friends say, "Don't do it, don't do it," which led him to believe it was a "premeditated attack."
- [131] When he asked the student to leave the room, the respondent was "under fire from a hail of abuse and threats". In his oral evidence he detailed that abuse and threats, which were foul mouthed racist remarks about his being white, insulting swear words, and statements that her mother was coming to get him and told him to "get out of my country". In his oral evidence he said he was not provoked by this language; it did not affect him, he said.
- [132] He went and stood behind his desk and repeatedly asked her to leave. He stated that the student continued to abuse him and threaten him with "loaded fists by her side." The respondent admitted to raising his voice with the student. He stated he was "acting brave and saying I wasn't scared of her or any of her family ... "
- [133] In his oral evidence he described how he had taught in difficult schools before where he had seen violence with persons injured, with eyes popped out, and knew he did not want to be trapped at his desk. He had other good students he realised he wanted to protect and had developed a control technique of making himself "look scary" and shouted that he was 5 foot 8. He had been taught to move with the troublemaking student to get them out of the room. He was not challenged on this evidence in cross examination.
- [134] In his oral evidence he described how she had said "I will roll you in the carpark, we will fuck you, get out of my country." He was not challenged in cross examination on this evidence either.

- [135] In his 21 March 2022 letter, he said he was then able to walk her outside. In his oral evidence he said that this was where he made the mistake, he should have locked the door, although they were not supposed to do that.
- [136] He stated that the student re-entered the classroom and approached him with her hands "half raised." The respondent pushed her away, but she kept coming towards him in a "fighting stance" and hit him in the jaw with a very powerful punch. In his oral evidence he confirmed that it was he that made the first physical contact by pushing her away. As we have noted, others (including the student herself) say it was she that initiated the pushing. Having regard to that conflict in the evidence we cannot be satisfied that he initiated the physical contact, but if he did, it was at a time when she had come at him with her fists cocked, and it was a self-protective or intuitive response.
- [137] He said he started "blocking a flurry of punches and kicks." In his oral evidence he described her saying she "needed her fucking phone" and then landed a "haymaker" punch on what he identified in the hearing room as his right jaw. He said she was threatening to "roll him" and that he did not strike her, only pushed her, defending himself. He was not challenged on this evidence in cross examination either.
- [138] The respondent stated that he put his arms around the student and dropped her to the ground. She broke free and continued to strike him while the respondent defended himself. The respondent stated that he was then kicked in the testicles as he was trying to get up.
- [139] In his oral evidence he described this by now as a "fully blown fight" and she clearly knew how to fight. He had taken her to the ground by her shoulders, she landed on him and he was trying to extricate himself as he was getting kicked and punched when she did a directed kick into his groin and landed the kick into his testicles. She then got up and as she came at him, he kicked her with a soccer style through kick with a fairly large arc, as he demonstrated it in the hearing room.
- [140] In his 21 March 2022 letter, he had said the student was coming towards him again. The respondent stated:
- I saw her coming and, in a state of desperation, swung my leg soccer style. It would have hit her in the side, but she sped up coming head first, and that is when contact was made. The kick was in sheer desperation and the contact to the face was complete misfortune. There was just no alternative it was like being attacked by a crazed lunatic.
- [141] His oral evidence was to similar effect, that the point of contact to her face was not intentional but a misdirected kick which was intended to diffuse the situation. He was not challenged on this evidence in cross examination either.
- [142] He gave oral evidence that she then came in and started attacking his laptop, pulling cords out. That is corroborated by the evidence of others identified earlier in these reasons.
- [143] In his 21 March 2022 letter, he had said that:
- Every chance was taken to de-escalate the situation; every opportunity was given to the student to leave the situation.
- I have been abused, threatened, kicked, and punched simply for doing my job.

I have lost my job, been unemployed for two years, lost my long service leave, and a large proportion of my superannuation simply for defending myself from a violent attack.

Due to my great skill and bravery at getting the Student out of the classroom, there was no need for any of the students to be too greatly impacted by these events.

[144] In his oral evidence, he explained that at the point where it had become a full fight, he was in “fight or flight mode” but that he was at no time angry or upset. When given an opportunity to explain why he thought it appropriate to kick her at all, he said he did not have time to think about it, it just came to mind, he was not upset, he was desperate. The kick was intended for some other part of her body, not her face.

[145] It was put to him by Counsel for the applicant that there were numerous opportunities and other ways he could have de-escalated this, including letting her get her phone when she came back. He disagreed with that proposition, asserting that based on his 20 years’ experience, a kick to her body, done when he was “not angry or upset” was acceptable and necessary. In his submissions to us at the close of the evidence, when asked if he had any insight into the seriousness of his conduct in kicking a child, he said that he had no better choice, he could not continue using his hands on her to resist her.

[146] The applicant has made the submission that it

...doesn't suggest that if assaulted a teacher is not entitled to take action to defend themselves from that assault. A teacher has the same rights as anyone to self-defence. However, this doesn't mean that a teacher when confronted with physical violence from a student should respond with like violence. Teachers are expected to employ behavioural techniques to respond to disruptive students.

If a teacher is pushed, it's not expected behaviour that a teacher will respond by pushing the student. If a teacher is punched, it is not expected behaviour that a teacher will respond by punching the student. If a teacher is kicked, it is not expected behaviour that a teacher will respond by kicking the student - particularly not in the head - and not when the student is a 14-year-old girl.

[147] That submission does not grapple with the realities of this melee, caused by aggressive, insulting, even humiliating, but legally provocative conduct of the student, nor provide any useful guidance as to how to reconcile the fact that a teacher with a faultless history is subjected to unprovoked violence, is entitled to take action to defend himself from that assault. It does not grapple at all with the effect of provocation on the teacher. Its reference to teachers being expected to employ behavioural techniques to respond to disruptive students does not respond to his evidence, which we accept, that he was employing behavioural techniques to respond to this disruptive student.

[148] Early during the hearing, the respondent had told the Tribunal that what he did that day, he would do again. By the end of the hearing, he told the Tribunal that a kick was not something he would do again, but the basis for that was to do with the trouble it had landed him in, not an acceptance that the kick was inappropriate.

[149] Sadly, this lack of insight about the inappropriateness of administering a controlled kick to of a student, albeit one who had just kicked him severely, and of the potential

seriousness of a kick to a student's head, albeit accidentally landing in the student's face, must result in the respondent's downfall. The kick itself was not administered compulsively, without thinking about it or defensively. It was certainly the result of severe provocation, verbal and racial abuse, insults and threats of physical violence as well as significant actual violence perpetrated on him up to that point. We do not accept that it was necessary for his own protection or that of his class. We do not accept that he did not have an alternative to taking that course or that he did not have a better choice.

- [150] As it turned out the kick was misplaced, and landed grazing her face; however, when one engages in such conduct, the consequences cannot be predicted, and the student may well have been severely injured had the kick struck her temple or throat.

Is the disciplinary ground in s 92(1)(h) established?

- [151] In our view the disciplinary ground in s 92(1)(h) is established in relation to the act of kicking the student.
- [152] We do not find that his conduct leading up to that kick was, in the circumstances, conduct falling short of the standard of behaviour generally expected of a teacher who might be found in that specific situation. In our view there was nothing in his conduct up until the student sought to re-enter the classroom that did not satisfy the standard of behaviour generally expected of a teacher in that situation. He was attempting to maintain discipline and control of the classroom and protect the other students under his care. He swore that he had learnt a lesson from an example he had encountered during his teaching career, of a teacher who had sat and done nothing as a student was murdered in front of the class.
- [153] As for the "fight" he engaged in outside the classroom door, the physical conduct of pushing hitting or pulling down the student resulted from provocative conduct from the student having initiated violent insulting humiliating and disrespectful conduct toward a teacher, punching him in the face and ultimately kicking the teacher in the genitalia. We accept his evidence, unchallenged in cross examination, that the teacher was seeking to maintain control of the classroom, and provide some level of protection and safety to the other students, and was acting in self-defence in doing what he did, including in kicking her to try to diffuse the situation.
- [154] He was criticised by the applicant for not diffusing the situation by letting her enter the class room to get her phone. We are not persuaded that had she been allowed to do so, it would have diffused the situation at all, and she would have been back in the room, ready, willing and able to assault the teacher, or damage his property, or further engage with the teacher. It is noteworthy that not only did she seek to damage his property when she did re-enter, but she smashed her own phone shortly thereafter in the presence of another teacher.

What is the appropriate sanction?

- [155] Section 160 of the Education Act applies to an approved teacher. It sets out the actions which may be taken by the Tribunal where it has determined that a ground for disciplinary action has been established. The Act provides, amongst other sanctions, two alternative sanctions under section 160(2) – either ending the suspension under 160(2)(b); or cancelling the teacher's registration and making an order prohibiting the

teacher from reapplying for registration or permission to teach for a stated period from the day the order is made or indefinitely under section 160(2)(j).

- [156] The taking of disciplinary action against approved teachers is one of the ways in which the main objects of the Act are to be achieved. As we have said already, those objects include upholding the standards of the teaching profession, maintaining public confidence in the teaching profession, and protecting the public by ensuring education in schools is provided in a professional and competent way by approved teachers.
- [157] The purpose of disciplinary action is not to punish the teacher. In *Queensland College of Teachers v TSV*⁸ the Tribunal stated:

The purpose of disciplinary action is not to punish the teacher. Instead, it is to further the objects of the EQCT Act. These include upholding the standards of the teaching profession, maintaining public confidence in the profession, and protecting the public by ensuring that education is provided in a professional way. It is essential that persons registered as teachers do not pose a risk of harm to children. Although punishment is not the aim, deterrence is a relevant consideration. The sanction imposed must provide “general deterrence to the members of the teaching profession and specific deterrence to further irresponsible conduct by the teacher in question”.

- [158] Those principles were referenced and applied by the Tribunal in *Queensland College of Teachers v XYZ (No. 2)* [2022] QCAT 47.
- [159] Other factors relevant to the Tribunal’s consideration of the appropriate sanction include the nature and context of the behaviour; the level of insight the Teacher has in regard to the impact the behaviour may have had on the Student he encountered with but also the other students who watched it, the school and the community; what actions the Teacher has taken to remedy the behaviour; his level of experience and teaching record and the level of remorse expressed by him.
- [160] The College did not refer to any decisions of the Tribunal with directly comparable factual situations, particularly any where there was any element of violence and provocation by the student that initiated the subsequent conduct by the teacher. It referred the Tribunal to several previous decisions in relation to the appropriate sanction.
- [161] In *Queensland College of Teachers v Mears*⁹ the teacher’s conduct included slapping a year 8 student on the head, swearing and hitting a student, swearing at students on multiple occasions, throwing a ball and swearing at a year 7 student, using intimidating/abusive language towards students, grabbing a student by the shirt to move him, grabbing a student by the throat, pushing a student into a whiteboard, throwing a duster in the direction of a student, elbowing/poking a student and pushing a student whilst yelling in close proximity to her face. The incidents spanned 2003 to 2011. There were ongoing unsuccessful interventions by the Department of Education to address the teacher’s conduct over the years. The teacher underwent psychological treatment and was noted to have low tolerance for frustration, difficulties with mood, impulse control and managing stress. The Tribunal suspended the teacher’s

⁸ [2015] QCAT 186.

⁹ [2012] QCAT 327.

registration for 15 months and required the teacher to obtain an independent psychological report addressing specific issues prior to reinstatement of registration.

[162] In *Queensland College of Teachers v Carroll*¹⁰ the teacher's conduct included striking a year 7 student on the back of the head, shaking a year 3 student by the shoulders and striking him on the arm, pushing on the chair of a year 7 student causing him to jump/fall off his chair, and behaving in a manner that upset and scared year 5 students. This conduct occurred over a period of three years. The sanction imposed was that if the former approved teacher reapplied for registration a psychologist report was required on reapplication addressing specific issues.

[163] In *Queensland College of Teachers v Teacher GBO* [2024] QCAT 179 this tribunal identified the allegations it accepted were as follows:

- (a) Allegation 1 – The teacher forcibly took Student A to the office, forced him to the floor and physically restrained him.
- (b) Allegation 2 – The teacher physically restrained Student A until his father arrived at the school (but not with a headlock as had been alleged).
- (c) Allegation 3 – The teacher physically restrained Student B from leaving the classroom (but not with a headlock).
- (d) Allegation 4 – The teacher forcibly turned Student C's face towards her.

[164] A magistrate in a criminal trial had determined that each of these actions constituted an assault. The magistrate acquitted the teacher on the basis that a defence of reasonable force for the purposes of discipline, correction and management applied and also observed that the teacher had been subject to vile language.

[165] The Tribunal found that, despite this

- [28] ...it is a community expectation that teachers will resist such provocation and that teachers will desist from physical restraints other than to prevent harm occurring. Accordingly, as the teacher accepts, the ground for disciplinary action is established.

[166] The Tribunal found that:

- [31] The teacher has been registered as a teacher since 1 December 2006 without, so far as the evidence indicates, any previous incidents of this kind. Her referees speak to her professionalism. Although not excusing the conduct, the incidents occurred in trying circumstances.
- [32] On the other hand, it is not a case of an isolated incident, but four separate occasions on which the teacher engaged in inappropriate physical contact with students. Further, while the teacher has now expressed her unqualified remorse, insight into the inappropriate nature of the contact was not clearly demonstrated in the teacher's earlier submissions.
- [33] We also note that, in view of the time that has elapsed, the teacher's registration has now been suspended for over five years. That is a substantial period of suspension relative to other cases of teachers assaulting students involving, arguably, more egregious conduct.

¹⁰ [2012] QCAT 395.

- [34] Having regard to these considerations, we conclude the appropriate order is that the teacher is reprimanded, and that suspension of her teacher registration is lifted upon completion of a behaviour management course and learning reflection, and provision of an independent psychologist's or psychiatrist's report satisfactory to the QCT as detailed in the Tribunal's orders.
- [167] The other cases of teachers assaulting students involving more egregious conduct referred to were *Queensland College of Teachers v Mears* [2012] QCAT 327; *Queensland College of Teachers v Carroll* [2012] QCAT 395 (noting those decisions were handed down when, unlike the current provisions, the legislation specified a maximum suspension period of five years).
- [168] In final written submissions we were asked to consider the circumstances in the decision in *Queensland College of Teachers v BDA* [2023] QCAT 141 ('BDA'). It was submitted that the facts here are worse than in *BDA*. There a teacher had been blindsided by an unprovoked punch from a student. The teacher was 'shocked by the suddenness of the student's loud and aggressive verbal abuse and blow, and stepped back before responding defensively and punching the student'. The student raised his arm as if to strike the teacher again, and the teacher punched him a second time and jumped out of the way. The incident ended there and the teacher escorted the student to a school office.
- [169] Unlike the present case, there the teacher was charged with one count of assault occasioning bodily harm, and was subsequently convicted after pleading guilty in the District Court. There is no reliable evidence in the present case that the student sustained any bodily harm. That this plea was entered meant that it must have been conceded that there was no defence of self-defence or provocation to the assault.
- [170] In finding the ground under s 92(1)(h) of the Act was established, the Tribunal said:
- A teacher is expected not to strike a student in any circumstances. In punching the student, BDA did not uphold the standards of the teaching profession. The incident does not maintain public confidence in the teaching profession, and BDA's actions were not professional.
- ...
- BDA is a highly experienced teacher with an exemplary record apart from the serious incident which occurred in 2019. A teacher must not hit a student. It is a significant failure to uphold the standards of the teaching profession, fails to maintain public confidence in the teaching professions and does not contribute to the provision of education in a professional and competent manner.
- [171] There, the effect of the Tribunal's orders was to suspend BDA's teacher registration for three years from the date his registration was initially suspended under s 47 of the Act. In effect he was not further to be suspended. Member Grigg who sits in the present matter was also on the Tribunal panel that decided BDA.
- [172] It was submitted by the applicant here that that the teacher in BDA had demonstrated significant remorse and insight, had reflected on his behaviour, and had the ongoing support of his family, colleagues, friends, and psychologist. Those matters satisfied the Tribunal that the provision of a psychologist's report before BDA could return to teaching was not necessary. The Tribunal noted that BDA had been given the benefit of ongoing counselling over a number of years, and had reflected on his behaviour.

- [173] It was submitted by the applicant in this case that those are mitigating features presently absent from the respondent's case. We reject that contention because in our view the teacher in the present case has indeed demonstrated significant remorse and insight, has reflected on his behaviour, and there is no suggestion he does not have the ongoing support of his family, colleagues, and friends. He even swore that the current principal of a prominent high school suggested he might return to teaching at that school. He is the parent of five daughters. Ultimately whether a teacher does or does not have any ongoing support from family, colleagues and friends is of peripheral significance in any event.
- [174] When the position to disciplining the teacher was articulated by the applicant in written submissions filed 24 November 2023, at a time when there was less clarity as to what had occurred in the incident, but the position of the applicant as to what had been seen to be serious about the teacher's conduct was more serious than the evidence has since disclosed, the disciplinary action that was urged on the Tribunal was that the respondent be prohibited from reapplying for teacher registration or permission to teach for three to five years from 13 March 2020 (the date of suspending the respondent's teacher registration), under section 160(2) of the Act.
- [175] Astoundingly, after the evidence elicited at the hearing demonstrated that on any view of the matter, the conduct of the respondent was far less culpable than was previously been thought to be the case, the disciplinary action that was urged on the Tribunal in written submissions dated 6 December 2024 was that the respondent ought to be prohibited from reapplying for registration or permission to teach indefinitely or for a lesser period determined by the Tribunal not less than five years. This was a significant change in position, not canvassed during the hearing itself, and the implications of it for the teacher were not explored with him whilst he was in the witness box.
- [176] In determining sanction, the Tribunal has carefully considered all the circumstances, both having regard to the teacher's history, background and experiences, his attempts to protect his pupils and his own safety. We have found that the kick itself was not administered compulsively, without thinking about it or defensively. It was certainly the result of severe provocation, verbal and racial abuse, insults, taunts and threats of physical violence as well as significant actual violence perpetrated on him up to that point. We do not accept that the kick was necessary for his own protection or that of his class. We do not accept that he did not have an alternative to taking that course or that he did not have a better choice.
- [177] We do not however consider that he generally poses an unacceptable risk of harm to children and should not be prevented from resuming his teaching career should he choose to do so.
- [178] The teacher's registration has been suspended since 2020. The Tribunal has found that a disciplinary ground has been established. However a very significant time has been taken to resolve this matter, and this is a matter of considerable significance which should be taken into account in determining the sanction. A three-year delay was held in the matter of *Queensland College of Teachers v TWF* [2024] QCAT 447 to be a significant reason to order that a suspension be ended.
- [179] In all the circumstances, the Tribunal is of the view that the teacher's conduct warrants a reprimand which would serve as a general deterrent to other teachers as well as a personal one to the teacher.

- [180] Having regard to what we have held to have been highly provocative conduct by the student and the lengthy period which has passed since the events in question we consider that the appropriate order is to order that the suspension of the teacher's registration as a teacher is ended under section 160(2)(b) of the *Education (Queensland College of Teachers) Act 2005* (Qld).
- [181] It was urged upon us by the applicant in final written submissions that there ought be an order pursuant to section 161(2)(d) of the Act, that a notation ought to be entered in the register of teachers that should the respondent apply for registration or permission to teach, the application must include an independent psychologist's report satisfactory to the Queensland College of Teachers addressing various matters including an assessment of the teacher's appreciation of what are not proper ways to engage with students, of the trust and power granted to a teacher of behaviour that may compromise the professional standing of a teacher and the profession of teaching and the need to protect students and children from physical, psychological, and emotional harm. Another was the identification and awareness of his triggers and strategies he intends to utilise to ensure no future recurrence of the incident of concern and the importance of complete adherence to the Queensland College of Teachers Code of Ethics. We do not consider that such a formulaic psychologist's report addressing those matters, in circumstances where his ability to teach will depend on the subjective view of whether it is a satisfactory to some person unidentified at the Ethics Department of the Queensland College of Teachers, is either warranted or justified having regard to the process he has just been through to arrive at these findings.

Non-publication

- [182] The Tribunal may make an order prohibiting the publication of information that may enable a person who has appeared before the Tribunal or is affected by a proceeding to be identified.¹¹ The Tribunal may make such an order if it considers it is necessary to avoid endangering the physical or mental health or safety of a person, to avoid the publication of confidential information or information whose publication would be contrary to the public interest or for any other reason in the interests of justice. We are satisfied that it is appropriate to continue the non-publication order subject to the necessary exceptions to permit the QCT to comply with s 164 and s 165 of the Act.
- [183] The Tribunal considers that in the public interest a non-publication order should be made under s 66 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), to ensure that the Teacher MXQ, any relevant child, Teacher MXQ's employing authority, or the school are not identified. The Tribunal prohibits the publication of any information that could identify Teacher MXQ, any relevant child, Teacher MXQ's employing authority or the school.
- [184] The College submitted that if a non-publication order was made, an exception be applied which enables the sharing of information for certain purposes. We agree and have expressed the non-publication order accordingly.

Orders

- [185] For the reasons that we have given, we make the following orders;

¹¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 66(1) and (2).

1. A disciplinary ground in s 92(1)(h) of the *Education (Queensland College of Teachers) Act 2005* (Qld) is established.
2. Teacher MXQ is issued with a reprimand under s 160(2)(c) of the *Education (Queensland College of Teachers) Act 2005* (Qld).
3. The suspension of the teacher's registration as a teacher is ended under s 160(2)(b) of the *Education (Queensland College of Teachers) Act 2005* (Qld).
4. The Register of Teachers is to be endorsed with a notation under s 160(2)(i) of the *Education (Queensland College of Teachers) Act 2005* (Qld) as follows:
 - (a) Other than to the parties to this proceeding and their legal representatives, and until further order of the tribunal, publication is prohibited of any information that may identify the respondent, the student, or the school, other than to the extent necessary for the Queensland College of Teachers to meet its statutory obligations and as provided for under the *Education (Queensland College of Teachers) Act 2005* (Qld). The teacher may give a copy of this decision and the reasons to any regulatory authority or employer in compliance with any disclosure requirements.
5. The Queensland College of Teachers may provide a copy of this decision to any regulating authority or employer in compliance with any disclosure requirements.
6. We grant the parties liberty to apply in respect of any other consequential or other orders which might be required to be made.

Annexure 2 - Criminal defences applicable to disciplinary proceedings under the *Education (College of Teachers) Act 2005 (the Act)*

Code section	Description of Code Defence	Excluded from application under Act	Examples where criminal defence applied and outcome
s268	Provocation to assault	No	<p>QCAT considered the application of this defence to a teacher in matter of QCT v MXQ [2025] QCAT 60 - with a sanction of reprimand only imposed rather than the indefinite prohibition sought by the College. This decision is subject to appeal.</p> <p>The teacher raised provocation and self-defence in his defence to disciplinary proceedings - alleging that he did not act in a manner consistent with the behaviour generally expected of a teacher.</p> <p>See Tribunal findings at para's [146] to [154].</p>
s271	Self-defence against unprovoked assault	No	An example, currently before an internal statutory committee for disciplinary proceedings against a teacher charged with assault occasioning GBH on their own 3 yo child – s271 defence raised and criminal charges discontinued by QPS on this basis.
s272	Self-defence against provoked assault	No	<p>Example 1 - See QCT v MXQ [2025] QCAT 60 – subject to appeal above.</p> <p>Example 2 – During a school camp, teacher allegedly punched, kicked and swore at a student following students throwing marshmallows at them. Teacher charged with assault occasioning BH had criminal charges dismissed after QPS offered no evidence due to witness inconsistencies and the availability of this defence as the teacher response in assaulting the victim was considered proportionate. No disciplinary action taken for the same reason.</p>
s280	Domestic discipline	No	See QCT v MXQ [2025] QCAT 60 above. This defence was not specifically raised at the hearing or in final submissions. However, it was considered in some written material before the Tribunal, including the QPS report as to why charges were not laid against the teacher – noting that the student and

Code section	Description of Code Defence	Excluded from application under Act	Examples where criminal defence applied and outcome
			her mother made no formal complaint. See also Tribunal findings at paragraphs [78], [152] to [154].
			Examples of alleged inappropriate minor contact/touching (for example, grabbing arm) by teacher of a student in classroom setting – QPS did not proceed with charges citing the availability of a s280 defence. No disciplinary action taken for the same reason.