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THE DISCIPLINING OF GOVERNMENT SCHOOL TEACHERS IN WESTERN AUSTRALIA: AN ANALYSIS

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ABSTRACT

This paper examines the taking of disciplinary action against school teachers in Western Australian government schools. It briefly examines the legislative history of section 7C of the Education Act 1928 (W.A.) which deals with 'misconduct' of teachers, and of regulation 86A of the Education Act Regulations 1960 (W.A.) which deals with 'inefficiency' of teachers. It then analyses some of the decisions of the Government School Teachers Tribunal handed down over the past decade in which teachers have appealed concerning action taken against them pursuant to section 7C of the Act or regulation 86A of the Regulations. The conclusion is that despite significant problems with aspects of the legislation, and despite the different approaches the Tribunal has taken in its interpretation of aspects of the legislation, it is possible to discern trends in what is meant by 'misconduct' and 'inefficiency'.

The Disciplining of Government School Teachers in Western Australia: An Analysis

*PETER WILLIAMS**

Introduction

Teachers hold a unique position in the community, and the standards of behavior expected of them can be different from those expected of others. As a consequence, where a teacher's conduct is seen as offending the standards of behavior demanded for members of that profession, the result is often protest and outrage. It is not surprising, then, that education systems have long had in place mechanisms to deal with the disciplining of teachers.[1]

In Western Australia the disciplining of teachers employed in government schools has been a process regulated by statute since the introduction of compulsory schooling in the state. That is not to say, however, that it has been a process free of difficulty or devoid of debate.

The aims of this article are, firstly, to provide insights into the legislative framework that has governed the disciplining of government school teachers in Western Australia, and secondly, to analyze decisions handed down during the past decade by the relevant appeal tribunal with a view to presenting a summary of the developing principles by which teacher behavior is judged for disciplinary purposes.

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Legislative Framework

A. The authority to appoint teachers.

In 1928 the Western Australian Parliament passed the Education Act 1928 (W.A.) [hereinafter "the Act"].[2] The Act, amended from time to time since 1928, [3] constitutes the framework within which education is managed and operated in Western Australia today.[4]

The power to appoint government teachers was vested, in 1928, in the Governor of the State of Western Australia, although provision was made to allow the Governor to delegate that power to the Minister for Education.[5] Under the provisions of the Act in its present form, the power to appoint teachers for government schools in the state is vested in the Minister for Education.[6]

B. The grounds upon which teachers can be disciplined.

The authority to discipline teachers is derived from the Act and regulations made pursuant to it. The current regulations are found in the Education Act Regulations 1960 [hereinafter "the Education Regulations"].[7] The grounds upon which disciplinary action can be taken against teachers have traditionally revolved around the notions of 'inefficiency' and 'misconduct'.

Since 1928 the Minister for Education has been authorized by section 28(1)(d) of the Act to make regulations for a variety of purposes, including the "...appointment, ...dismissal,...discipline, and duties of teachers".[8] In 1960, the regulation-making power of the Minister was broadened when a provision was inserted into section 28 allowing the Minister to make regulations:

> (d1) Prescribing grounds, including such moral grounds, whether connected with the employment and functions of teachers or not, as the Minister thinks fit, which for the purposes of this Act amount to misconduct and for which a teacher may be dismissed from the department.[9]

Prior to 1961 regulation 134 had been made pursuant to section 28 to deal with the matter of misconduct of teachers. It defined misconduct (for which a teacher could be punished in a variety of ways) as including "breach of any departmental order lawfully given and absence from school without leave, or for breach of [the] regulations, or gross inefficiency..." Under this provision, 'gross inefficiency' was one of the grounds constituting misconduct, and the power to punish the teacher for misconduct lay in the hands of the Director-General of Education at that time.[10]

In 1979 the regulation was revoked and re-enacted to provide more specific grounds upon which a teacher could be found guilty of misconduct[11] but inefficiency continued to be treated as constituting misconduct. Such grounds included, *inter alia*, "[engaging] in disgraceful or improper conduct, whether during or connected with [the teacher's] employment and functions as a teacher or not" and being "inefficient or incompetent and such inefficiency or incompetence appears to arise from causes within [the teacher's] own control". Under the 1979 regulation, procedures for dealing with cases of misconduct were laid out in detail, and the power to punish for misconduct was divided between the Minister for Education, who was authorized to dismiss a teacher upon a recommendation of the Director-General of Education, and the Director-General of Education, who was authorized to impose a variety of penalties other than dismissal.

The regulation attracted considerable criticism from teachers, the State School Teachers' Union of Western Australia (Inc.) [hereinafter "the Teachers' Union"] and others.[12] And in *Lunghi v Minister for Education*[13] a teacher who had been fined by the chief executive officer for misconduct challenged the validity of aspects of regulation 134 before the Western Australian Supreme Court.[14] In 1981 the provision was redrafted so as to exclude any reference to inefficiency, and the redrafted provision dealing solely with misconduct was inserted as section 7C in the Act primarily to ensure its validity.[15] As a result of a series of amendments to the Education Regulations between 1979 and 1982 a provision relating to inefficiency was inserted in the Education Regulations as regulation 86A, and regulation 134 was deleted.[16]

Criticism of aspects of section 7C continued in that it was felt that the wording of parts of the provision would allow a teacher to be punished for conduct that bore no relationship to his or her work as a teacher.[17] In 1983 the section was amended in an attempt to respond to such criticism, and the result is section 7C in its present form.[18]

Grounds and Procedures for Disciplining Teachers

Regulation 86A of the Education Regulations permits action to be taken against a teacher on the ground of inefficiency, while section 7C of the Act allows action to be pursued against a teacher on the ground of misconduct.

A. Inefficiency

Regulation 86A provides that a teacher who is inefficient is liable to be reduced to a position carrying a lower salary or remuneration or dismissed.[19] Before action can be taken under the regulation, the chief executive officer must receive at least 2 reports that the teacher is inefficient.[20] The reports must come from the principal of the teacher's school or a person in the position of Superintendent or higher,[21] copies must be given to the teacher and the teacher must be requested to submit a written explanation on the reports.[22] Where, upon consideration of the reports and of the explanation provided by the teacher, the chief executive officer is satisfied that the teacher is inefficient, the chief executive officer may direct that the teacher be reduced to a position carrying a lower salary or recommend to the Minister that the teacher be dismissed.[23] In the latter case, the Minister may, after considering the reports that the teacher is inefficient, the explanation provided by the teacher and the recommendation made by the chief executive officer, dismiss the teacher.[24]

Neither the Act nor the Education Regulations provide any definition of 'inefficient' or 'inefficiency'.[25]

B. Misconduct

Section 7C sets out the definition of misconduct[26] as well as the procedures for handling a claim of misconduct. In simple terms, where it appears to the chief executive officer that a teacher may be guilty of misconduct, the chief executive officer shall cause an inquiry to be held by an authorized person.[27] The inquiry can be informal but the section requires that the teacher be informed of the nature of the alleged misconduct and be given an opportunity of furnishing an explanation in relation to the alleged misconduct.[28] Where the chief executive officer determines as a result of the inquiry that the teacher is guilty of misconduct, he may impose a variety of punishments.[29] In addition he is empowered to make a report to the Minister and recommend that the teacher be dismissed.[30] The Minister, after considering the report and recommendation of the chief executive officer, and after considering the explanation given by the teacher, may order in writing that the teacher be dismissed.[31]

The Government School Teachers Tribunal

The Industrial Relations Act 1979 (W.A.)[hereinafter "the Industrial Relations Act"], which regulates the industrial relations of employers and employees generally within the State of Western Australia,[32] establishes a specialist tribunal known as the Government School Teachers Tribunal [hereinafter "the Tribunal"].[33] The Tribunal has exclusive jurisdiction to hear and determine, *inter alia*:

- an appeal by a teacher against any punishment for alleged misconduct imposed on him under the Education Act 1928 other than a punishment that is a reprimand or a fine that does not exceed $50.00;[34] and

- an appeal by a teacher against his dismissal, or reduction to a position carrying a lower salary or remuneration, for inefficiency under any regulations relating to the assessment of inefficiency and made under the Education Act 1928.[35]

An appeal to the Tribunal may be instituted by the teacher or by the Teachers' Union, the industrial union representing the interests of teachers in the state.[36]

A. The nature of appeals pursuant to sections 78(1)(b)(iii) and (iiia)

As indicated above, sections 78(1)(b)(iii) and 78(1)(b)(iiia) of the Industrial Relations Act authorize the Tribunal to hear and determine appeals by teachers against sanctions imposed for misconduct or inefficiency. The wording of both provisions suggests that the right of appeal is against the sanction imposed and not against the finding of misconduct or the finding that the teacher was inefficient.[37]

In *Milentis v. Minister for Education*[38] the Full Bench of the Western Australian Industrial Relations Commission was asked to determine whether an appeal brought pursuant to section 78(1)(b)(iii) was to be heard as a strict appeal, a rehearing or a hearing *de novo*.[39] After discussing the differences between the three forms of appeal,[40] and after examining the role that section 78(1)(b)(iii) was intended to play within the overall framework of the Industrial Relations Act and within the framework of other rights of appeal granted by the Act,[41] the Full Bench felt that:

> [the] nature of an appeal brought pursuant to section 78(1)(b)(iii) is to be gleaned from the purpose expressed in its provisions, that is to permit an aggrieved teacher to challenge any punishment and also, if he should wish to,

> the alleged misconduct which gave rise to the punishment. Nothing contained in the Act suggests there should be a limitation placed upon a teacher's right to make that challenge....Indeed, the statute gives every reason to believe that the process of each of the appeals listed in section 78(1)(b) should be the same in each instance.[42]

The Full Bench concluded that an appeal under section 78(1)(b)(iii) was to be heard by way of rehearing, i.e. the Tribunal should require the appellant to displace the decision under challenge but the Tribunal is also empowered to try afresh the matters upon which the decision rested if that course is justified on the grounds of appeal.

This view of the nature of the appeal under section 78(1)(b)(iii) contrasts with comments made by a member of the Industrial Appeal Court in *Milentis v. Minister for Education,*[43] a case in which Milentis had challenged the legality of a decision of the Chairman of the Tribunal declining to direct the chief executive officer to provide Milentis with further and better particulars of the misconduct alleged against him. In the course of the decision, which essentially dealt with the powers of the Chairman of the Tribunal, Franklyn J. commented:

> The appeal authorized by section 78(1)(b)(iii) of the [Industrial Relations Act 1979] is not one against the finding of misconduct but only against the punishment imposed therefor i.e. in this case the punishment of dismissal. If successful it will result in that punishment being removed but will not affect the finding of misconduct. Neither the Education Act 1928 nor the [Industrial Relations Act 1979] authorize any appeal against a determination by the [chief executive officer] of misconduct on the part of the teacher and if misconduct is not such within the meaning of the Education Act 1928 then the appropriate remedy is not to be found in an appeal under the provisions of the [Industrial Relations Act 1979].[44]

While some teachers have appealed only against the sanction imposed and not against the finding of inefficiency or misconduct,[45] most appeals before the Tribunal have proceeded by way of a rehearing. Thus the Tribunal has been able to address not only the question of whether the penalty imposed was the appropriate one in the circumstances but also the issue of whether the conduct of the teacher constituted inefficiency or misconduct as the case may be.[46]

B. The reporting of decisions of the Tribunal

Before looking at a number of decisions of the Tribunal concerning appeals by teachers, it is of interest to note section 80A(5) of the Industrial Relations Act. Section 80A(5) provides:

> No record relating to an appeal against a punishment imposed on a teacher shall be open to public inspection.

On its face, the provision creates difficulties in gaining access to Tribunal decisions. Clearly the provision is intended to prohibit all forms of public access to any records of the Tribunal relating to appeals by government school teachers against punishments imposed for misconduct pursuant to section 7C of the Act. It would seem logical to take the view, as the Tribunal has done,[47] that the prohibition is also intended to apply to records of the Tribunal relating to appeals by teachers against sanctions imposed for inefficiency, even though regulation 86A of the Education Regulations does not use the word 'punishment' when it authorizes the imposition of specific sanctions for inefficiency.

In *Vincent v. Minister for Education*[48] the Tribunal discussed the meaning and effect of section 80A(5). The Tribunal acknowledged that past practice had been to publish the reasons for decision and the determinations of appeals in such cases, and that there were sound reasons for such a practice.[49] It concluded, however, that the practice was clearly not permitted by section 80A(5).

The result is that decisions of the Tribunal relating to appeals concerning misconduct and inefficiency are difficult, if not impossible in most cases, to access.[50]

The Meaning of 'inefficient' in Regulation 86A

The case of *Shepherd v Minister for Education*[51] is indicative of cases in which an appeal against dismissal for inefficiency has been pursued. The teacher had been dismissed from the Education Ministry for inefficiency. On appeal, the Tribunal concluded that on the evidence before it the teacher had exhibited severe weaknesses in some fundamental areas as a teacher. The Tribunal noted that the teacher's poor classroom management skills inhibited her ability to provide an effective educational program for her students leading to a situation of day to day disarray and confusion in the classroom.[52] The Tribunal felt that such a basic defect coupled with deficiencies in the teacher's teaching technique confused the students and presented

them with no clear purpose of what the lesson being given to them was all about.[53] The Tribunal noted that the result was a fall-off in student achievement and loss of a sense of purpose in the teacher's classes, and that such a state of affairs was added to by the teacher's poor preparation and planning.[54] The Tribunal agreed with the finding of the Education Ministry that the teacher was inefficient.

The grounds put forward in the various cases as constituting inefficiency have included:

- poor preparation of lessons;[55]
- lack of sound classroom management skills;[56]
- poor communication skills;[57]
- lack of rapport with students;[58]
- poor planning, implementation and evaluation of lessons;[59]
- deficiencies in teaching technique;[60]
- absence of basic teaching skills and formal qualifications.[61]

While regulation 86A contains no definition of 'inefficient'[62] an analysis of the small number of available cases where appeals in relation to inefficiency have been heard suggest a number of generalizations. First, the finding of inefficiency has usually been made out not in the light of an isolated happening but rather on the basis of a culmination of a number of factors that have been perceived as being present for a period of time.[63] Second, the finding of inefficiency has been made in the context of the status or position held by the teacher.[64] Third, the notion of inefficiency has largely been applied to how the teacher has gone about tasks associated with teaching, rather than how the teacher has behaved away from the school. Fourth, the deleterious effect of the teacher's conduct on the students' learning appears to have played a significant role in finding a teacher inefficient.

The Meaning of Misconduct in Section 7C.

Section 7C(2) of the Act specifies the types of conduct that constitute misconduct for the purposes of the Act.[65] Over the past decade, only two of the grounds of misconduct specified in section 7C(2) have been the subject of appeal to the Tribunal.

A. Failure to obey a lawful order

A teacher's failure to obey a lawful order constitutes misconduct. In *McGavin v. Minister for Education*[66] the teacher was dismissed for misconduct. One of the grounds relied on by the Ministry of Education was that the teacher had been guilty of misconduct in that he had "disobeyed a lawful order applicable to him as a person on the teaching staff of the department" contrary to section 7C(2)(a). The Tribunal agreed that, on the evidence, the teacher had failed to carry out duties involved in supervision in the playground and that he had not complied with a reasonable direction to supervise some students in the absence of their teacher.[67] The teacher had argued that such instances were trivial and were not sufficient to demonstrate that he was indicating an intention to be no longer bound by his contract of employment.[68] However, the Tribunal took the view that his failure to carry out such duties had been inordinate and had allowed a situation where the Ministry's duty of care responsibilities had been undermined.[69] The Tribunal concluded that he was guilty of misconduct in accordance with section 7C(2)(a).

B. Engaging in disgraceful or improper conduct

It appears that in all of the available appeal cases involving misconduct, the primary ground relied on by the Ministry of Education for the action it has taken against the teacher concerned has been misconduct on the basis of section 7C(2)(e): the teacher was guilty of misconduct because he engaged in "disgraceful or improper conduct in his official capacity or otherwise by reason of which he ceases to be a fit and proper person to hold office as a teacher".

(i) the meaning of section 7C(2)(e)

The wording of section 7C(2)(e) has presented the Tribunal with a number of problems and the Tribunal has taken different approaches in its interpretation of the provision.

In *Pryce*[70] the teacher had been found guilty of misconduct pursuant to section 7C(2)(e) after he had been convicted of a drugs-related offense on a plea of guilty. Arguing that the conviction following upon a plea of guilty constituted misconduct pursuant to section 7C(2)(e) of the Act, the Ministry of Education imposed a penalty of compulsory transfer to another school at the teacher's own expense pursuant to section 7C(12)(iii) of the Act. The teacher appealed, arguing, *inter alia*, that the conviction did not constitute misconduct for the purposes of section 7C(2)(e).

The teacher argued that the words "or otherwise" in the phrase "...conduct in his official capacity or otherwise..." in section 7C(2)(e) were ambiguous and that it was therefore inappropriate to interpret such words as meaning that the conduct complained of could relate not only to conduct in a teacher's official capacity but also to the social and moral conduct of a teacher in his or her unofficial capacity.[71] The Tribunal looked at the legislative history of the section and concluded that the phrase should be interpreted as meaning "conduct in his official capacity as a teacher or conduct in any other capacity or way", but that behavior in a teacher's private life was caught by section 7C(2)(e) only if it "impinge[d] upon his...fitness to carry out the duties of a teacher".[72] The issue then, the Tribunal felt, was whether or not the conviction of the teacher, arising from circumstances not directly related to his school or his students or his functions as a teacher, constituted disgraceful or improper conduct by reason of which he ceases to be a fit and proper person to hold office as a teacher.[73] The Tribunal went on to confirm the finding of the chief executive officer that the teacher was guilty of misconduct in terms of section 7C(2)(e).

In *Pryce*, then, the Tribunal took the view that where it is claimed that the teacher is guilty of misconduct because of conduct in his or her private life, the conduct will amount to misconduct for the purposes of section 7C(2)(e) only where there is a conclusion that the teacher is no longer a fit and proper person to hold office as a teacher. The corollary conclusion of no longer being a fit and proper person to hold office as a teacher, according to the Tribunal, is simply related to conduct in the teacher's private life.

The Tribunal took a different approach in *Schneider v. Minister for Education*.[74] A deputy principal of a primary school was found to have been guilty of misconduct in terms of section 7C(2)(e) on the ground that on one occasion he had been responsible for an unsuitable video being viewed by students between 10 and 12 years of age whom he was supervising at that time at school.[75] Consequently he was transferred to another school. He then appealed to the Tribunal against both the finding of misconduct and the penalty of transfer, and the Tribunal upheld the appeal on both grounds. The Tribunal decided that while the supervision provided by the deputy principal was inadequate in the circumstances and constituted a neglect of the proper supervision of students, it did not constitute misconduct in terms of section 7C(2)(e).

In looking at the meaning of the provision, the Tribunal commented:

> In our view a teacher guilty of misconduct for the purposes of [section 7C(2)(e)] must have by his or her action/s struck at the heart of the contract of employment by repudiating in a fundamental way the duties and responsibilities and trust reposed in him or her. This must be so given that the corollary conclusion to the fact of misconduct in this subsection of the Education Act 1928 is that the teacher so guilty is not fit to continue in that position.[76]

According to the Tribunal in *Schneider*, then, the corollary conclusion of no longer being a fit and proper person to hold office as a teacher is related not only to conduct in the teacher's private life but also to conduct in a teacher's official capacity.

A third approach has been to imply into section 7C(2)(e) the freedom to find misconduct simply on the basis of improper or disgraceful conduct in a teacher's official capacity or otherwise and to ignore, in effect, the requirement of the corollary conclusion that the teacher no longer be a fit and proper person to hold office as a teacher. In *Vincent v. Minister for Education*[77] a teacher was found guilty of misconduct under section 7C(2)(e) after he was found to have acted improperly towards another teacher by arriving at her place late one night and causing her fear and distress. He was transferred to another school at his own expense pursuant to section 7C(12). The Tribunal felt that, given provision in the Act to apply a range of penalties in cases where a teacher has been found guilty of misconduct,

> [it] is arguable...that while the [Education Act 1928] does not expressly provide for a conclusion that a teacher has misconducted himself or herself on the basis of a finding that he or she is guilty of engaging in disgraceful or improper conduct in his or her official capacity (which is to say while at work) or otherwise (which is to say as relevant to the employment relationship and/or workplace), it may be implied that it does allow of this finding; and for such a finding to stand alone by virtue of the range of disciplinary measures to apply including dismissal but not exclusively dismissal.[78]

In a sense the interpretation adopted by the Tribunal in the *Schneider* case is a favorable one for teachers. The approach sets a rigorous standard by which conduct must be judged - conduct in a teacher's official capacity will only amount to misconduct if it means that the teacher is no longer a fit and proper person to hold

office as a teacher. However, the *Schneider* approach is problematical for a number of reasons. First and perhaps most importantly, an examination of the legislative history of section 7C(2)(e)[79] makes it clear that the intent of the provision was to establish a relationship between conduct in a teacher's private life and the conclusion that a teacher is no longer a fit and proper person to hold office as a teacher. Under the 1981 wording[80] a teacher's conduct in his/her private life could be found to be misconduct even though it had no bearing on his/her role as a teacher. The 1983 wording[81] was adopted to make it clear that conduct in the teacher's private life would amount to misconduct only if it bore a relationship to his/her role as a teacher, or, to put it another way, only if the corollary conclusion was that the teacher was no longer a fit and proper person to hold office as a teacher. Second, the word 'or' is, as a general rule, read disjunctively,[82] indicating that the corollary conclusion of no longer being a fit and proper person to hold office as a teacher is not related to conduct in the teacher's official capacity but rather to conduct in any other capacity or way. Third, where a teacher is found to have engaged in disgraceful or improper conduct 'in his official capacity', to add the requirement that he thereby ceases to be a fit and proper person to hold office as a teacher means that he cannot be guilty of misconduct under that provision if he is found to be a person who is fit to hold office as a teacher. Thus, where a teacher has committed minor incidents of improper conduct and the teacher is still considered to be a fit and proper person to hold office as a teacher, as in the *Schneider* case, he cannot be found guilty of misconduct under section 7C(2)(e).[83]

The *Vincent* approach is also problematical. It, too, ignores the policy reasons behind section 7C(2)(e) in its present form. In addition, while it allows for a finding of misconduct pursuant to section 7C(2)(e) on the basis of minor incidents of improper conduct, it ignores the legislative requirement that there be a corollary conclusion that the teacher is no longer a fit and proper person to hold office as a teacher.

It is submitted that the *Pryce* approach to the interpretation of section 7C(2)(e) is the preferable approach. It is consistent with the intent of the Parliament, it is consistent with general principles of statutory interpretation, and it allows for the application of a realistic and workable framework to the matter of misconduct.

(ii) acts constituting misconduct under section 7C(2)(e)

The categories of conduct that have been held to constitute misconduct for the purposes of section 7C(2)(e) are various.

• **conviction of a criminal offense**

In *Pryce*[84] the teacher had been convicted upon a plea of guilty of having in his possession a utensil, viz. a bong, for use in connection with the smoking of a prohibited plant, having detectable traces of a prohibited plant, viz. cannabis, pursuant to section 5(1)(d)(i) of the Misuse of Drugs Act 1981 (W.A.). The Tribunal felt that such a conviction, particularly in a country town, indicated that the teacher had conducted himself in a manner inimical to the role of a teacher, and that there was no room for the adage "Do as I say not what I do or can be perceived to be doing" in such an environment.[85]

• **conduct that is disruptive to the good order and harmony of the school**

In *McGavin v. Minister for Education*[86] a teacher was dismissed pursuant to section 7C(2)(e) and the Tribunal affirmed the dismissal. It found that the teacher had engaged in a pattern of unnecessary and unreasonable confrontation with officers of the department and at the school. On one occasion, for example, when it was decided that a deputy principal would take over the teacher's class for a period, the teacher invited his class to express its preference as to his or the deputy principal's teaching, and this was done in front of the deputy principal. The Tribunal also agreed that by his failure to undertake supervision of students when required, he had allowed a situation where the department's duty of care responsibilities were undermined; such actions demonstrated, the Tribunal thought, an attitude of disregard for the effect on other employees and a contempt for the recognized standard procedures at the school.[87]

In *Anderson v. Minister for Education*[88] the teacher was employed as a Guidance Officer for a number of primary and secondary schools in a country town. He had been dismissed when it was found, upon investigation, that in the discharge of his duties he had been rude to staff and students, he had an abrasive manner, he swore, he did not follow school practices and procedures, and his services were being rejected by students who felt intimidated by his manner. The Tribunal concluded that such findings were justified and confirmed the decision to dismiss the teacher.

• **conduct that puts the safety of employees at the workplace in danger**

In *Vincent v. Minister for Education*[89] the teacher was a member of the staff at a country secondary school. After consuming alcohol one evening at a hotel, he visited another teacher's house where he loudly and persistently insisted on access to the house. A young female first year teacher was asleep alone in the house. She reluctantly let him in, and it was only after she repeatedly asked him to leave that he did so. The young teacher was scared throughout the incident and remained

somewhat apprehensive subsequent to it. The teacher was found guilty of misconduct and was transferred to another school. The Tribunal on appeal confirmed both the finding of misconduct and the penalty of transfer. The Tribunal felt that while an employee should be able to conduct his or her personal life without undue interference from the employer, an employer is obliged to take action in relation to the actions of an employee away from the workplace if it can be reasonably held that a consequence of the action may be a deterioration of workplace safety.[90] The Tribunal held that an uninvited late night visit by the teacher in a drunken state and loudly and persistently demanding access to the abode of a colleague was offensive and intrusive and was likely to have a deleterious effect in the workplace.[91] The Tribunal concluded that the finding of misconduct was justified in the light of the serious nature of the teacher's action and its ramifications for workplace relations and the reasonably held apprehension that further such incidents could occur.

- **conduct that is not in the best interests of students**

In *Partington v. Minister for Education*[92] a teacher was dismissed after it was found that he had invited one of his students into his home and had initiated physical contact with the student by kissing and fondling the student without the student's compliance. The Tribunal upheld the finding of misconduct, commenting that the fundamental precept of the teacher's position as a teacher in relation to the student was responsibility for the student's well-being both educationally and generally, and that the teacher's behavior was a breach which could have had serious consequences for that well-being.[93]

In *Milentis v. Minister for Education*[94] the teacher had been dismissed in the light of various findings, including the finding that children in his class had experienced a high degree of tension and fear as a result of the teacher's teaching style and student management procedures. The teacher had initially appealed against the penalty of dismissal, but the case was not proceeded with.[95]

Natural Justice

Principles of natural justice, or procedural fairness as it is more commonly labeled, require that a decision-maker afford an opportunity to be heard to a person whose interests will be adversely affected by the decision, and that the decision-maker be unbiased in the matter to be decided.[96] Thus, in appealing against the finding of inefficiency under regulation 86A of the Education Regulations and misconduct

under section 7C of the Act, it has been common for the teacher concerned to argue as one of the grounds of appeal that he or she was denied natural justice.[97]

Both section 7C and regulation 86A specify certain procedures which are to be complied with when action is taken against a teacher under those provisions.[98] In addition, the Education Ministry's own set of guidelines emphasize the need to comply with procedural fairness when dealing with matters under those provisions.[99]

When confronted with a claim that the teacher has been denied natural justice, the Tribunal has looked closely at the procedures adopted by the Ministry of Education to ensure that the teacher has been given 'a fair go all round'.[100] In cases where the Tribunal has felt that the teacher has not been given 'a fair go all round', the Tribunal has adopted one of two approaches. On the one hand, the Tribunal has argued that because an appeal pursuant to section 78(1)(b)(iii) of the Industrial Relations Act is by way of a rehearing, an appeal to the Tribunal provides an opportunity for the teacher not only to raise the claim of procedural unfairness but also the means to correct it.[101] On the other hand, the Tribunal has adopted an approach in which it will balance findings against the teacher and the fact of procedural unfairness. In *McMillan v. Minister for Education*[102] the Tribunal found serious flaws in the procedures followed by the Ministry of Education when it took action under regulation 86A and felt that such flaws did amount to a denial of procedural fairness.[103] However, the Tribunal concluded that the denial of procedural fairness was outweighed by the very clear and unequivocal evidence of one of the reports that the teacher was inefficient, especially in view of the fact that on appeal the teacher had not undermined the strength of the report.[104]

Conclusion

At first glance, the disciplining of government school teachers in Western Australia is a straightforward affair. Statutory provisions set out two grounds only upon which teachers can be formally disciplined, *viz.* inefficiency and misconduct, and the Ministry of Education can, after following specified procedures, impose or recommend sanctions against a teacher whom it has found to be inefficient or guilty of misconduct. A specialist tribunal, the Government School Teachers Tribunal, is authorized to hear appeals by teachers against sanctions imposed for inefficiency and misconduct and to either uphold or dismiss such appeals.

Despite this apparent simplicity, it would seem reasonable to suggest that the legislative framework within which the Ministry of Education and the Tribunal must deal with cases of alleged inefficiency and misconduct is seriously flawed in at least two respects. First, the wording of section 7C(2)(e) of the Act is ambiguous and clumsy, causing difficulty for the Tribunal in interpreting it, perplexity for the Ministry of Education when taking action pursuant to it, and, undoubtedly, confusion for teachers who must avoid acting in breach of it. Second, the prohibition in section 80A(5) of the Industrial Relations Act against public access to written decisions of the Tribunal denies the fundamental right of teachers to know the standards by which their conduct will be judged.

On the other hand, it would also seem reasonable to suggest that the legislative scheme discussed in this paper achieves a number of objectives. First, it confirms that primary responsibility for managing cases of teacher inefficiency and misconduct rests with those responsible for the day-to-day running of schools, such as school principals, superintendents, and the chief executive officer of the Ministry of Education. Second, the establishment of the Tribunal as an appeal body with the power to conduct an appeal as a rehearing constitutes a control mechanism over the power of the Ministry of Education, ensuring that the Ministry addresses in a reasonable and fair way not only the question of what sanction to impose but also the question of whether the conduct complained of does amount to misconduct or inefficiency, as the case may be. Third, while it does appear that during the past decade the number of appeals by teachers to the Tribunal has not been significant,[105] it is possible to discern in the decisions of the Tribunal certain themes or principles that clarify and illuminate the statutory criteria of 'inefficient' and 'misconduct'. In this way, and in spite of the absence of a definition of 'inefficient' for example, Tribunal decisions are providing a developing set of guidelines within which the Ministry of Education can assess the conduct of its teachers.

[1] A perusal of court decisions summarized in the *Recent Developments in the Law* section of the *Journal of Law & Education* indicates the variety of grounds upon which teachers are disciplined in the various education systems in America and the mechanisms by which such disciplining takes place. *See, e.g.*, BIRCH, THE SCHOOL AND THE LAW 39-42 (1976); BOER & GLEESON, THE LAW OF EDUCATION 108-115 (1982); and BIRCH & RICHTER, COMPARATIVE SCHOOL LAW 159-160 (1990) for an overview of how the different Australian education systems deal with the disciplining of teachers.

[2] The Act was passed "to consolidate and amend the law relating to public education" that had operated in the state since the achievement of full self-government in 1893 as a colony of Great Britain.

[3] The Act has been amended in excess of 50 times since 1928 and has been reprinted in its amended form on at least 6 occasions. It was last reprinted as at August 11, 1992, pursuant to the Reprints Act 1984 (W.A.). *See infra* note 7.

[4] *E.g.*, by section 5 of the Act the Minister for Education is responsible for doing all things necessary for carrying out the purposes of the Act - he is, for example, capable of suing and being sued. By section 9 the Minister is authorized to establish and maintain and carry on such government (i.e. state-owned) schools as he deems necessary for public education. The Minister is primarily the political head of the government education bureaucracy known as the Ministry of Education, or Education Department as it has been traditionally called. Section 7 of the Act creates the office of chief executive officer who is responsible for the administration of the Act. The chief executive officer, or director-general as the office was traditionally termed, is the administrative head of the Ministry of Education.

[5] Section 7(1)(b) of the original Act. The Governor is the representative of the British sovereign in Western Australia.

[6] Section 7(2) of the Act.

[7] The Education Regulations were reprinted as at September 18, 1989. Where any written laws have been reprinted, the reprinted version is, by virtue of the Reprints Act 1984 (W.A.), the authorized version of those written laws.

[8] Sections 28 and 28A of the Act permit the Minister to make regulations for wide-ranging purposes. The Education Regulations and the School Premises Regulations 1981 have been made pursuant to the Minister's regulation-making powers.

[9] Section 20 of the Education Act Amendment Act 1960 (W.A).

[10] *See* the Education Act Regulations 1960, reprinted as at March 19, 1971.

[11] GOVERNMENT GAZETTE, WESTERN AUSTRALIA; August 17, 1979, p. 2522.

[12] It was argued, for example, that it would have been possible for the Ministry of Education to punish a teacher for conduct in the teacher's private life, even though such conduct might have no impact on the teacher's position as a teacher. For a discussion of the legislative history of the regulation and of the changes to the statutory provisions dealing with misconduct *see* State School Teachers' Union of Western Australia (Inc.) v. Minister for Education, 67 W.A.I.G. 681 (1986) [hereinafter *Pryce*].

[13] [1982] W.A.R. 227.

[14] The teacher had been fined $80.00 for misconduct. The chief executive officer had imposed the fine for misconduct pursuant to regulation 134(5)(a)(ii) of the Education Regulations, arguing that the power to make a regulation imposing a fine for vocational misconduct was implied in the power to make regulations for the vocational disciplining of teachers contained in section 28(1)(d) of the Act. However section 28(1)(r) of the Act allowed the Minister to make regulations "imposing a penalty not exceeding two hundred dollars for the breach of any regulation". The teacher argued that the power to fine indicated in regulation 134(5)(a)(ii) was not authorized by section 28(1)(d), particularly in the light of the power to make regulations of the type specified in section 28(1)(r) of the Act. The court agreed and concluded that regulation 134(5)(a)(ii) was invalid.

[15] Section 2 of the Education Amendment Act 1981 (W.A.).

[16] GOVERNMENT GAZETTE, WESTERN AUSTRALIA; November 9, 1979, p. 3582; April 24, 1980, p. 1245; March 19, 1982, p. 947; December 30, 1988, p. 5114.

[17] *See infra* notes 79-81 and accompanying text.

[18] Section 2 of the Education Amendment Act 1983 (W.A.) simply altered the wording of section 7C(2)(e) of the Act. Section 7C(2)(e) currently provides:

> For the purposes of this section a teacher shall be guilty of misconduct if -
>
> (a) he disobeys or disregards a lawful order applicable to him as a person on the teaching staff of the department;
>
> (b) he fails to comply with or contravenes any of the provisions of this Act or regulations;
>
> (c) he is absent from school without leave;
>
> (d) he willfully makes a false entry in a return or register; or
>
> (e) he engages in disgraceful or improper conduct in his official capacity or otherwise by reason of which he ceases to be a fit and proper person to hold office as a teacher.

[19] Regulation 86A(1) of the Education Regulations.

[20] Regulation 86A(2) of the Education Regulations.

[21] Regulation 86A(2a) of the Education Regulations. Regulation 86A insists that the reports that a teacher is inefficient must come from specified persons within the education system. However, a suggestion or claim that a teacher is inefficient can conceivably be made at first instance by various persons, and regulation 135 of the Education Regulations provides a procedure whereby parents, students or other persons can lodge a complaint against a teacher with the chief executive officer. Regulation 135 allows the chief executive officer to hold an inquiry into the complaint but says nothing about what the chief executive officer can do once the inquiry is completed. Presumably the nature of the complaint and the chief executive officer's assessment of it will determine whether the chief executive officer then proceeds under the provisions of regulation 86A or under section 7C, or, indeed, whether he does nothing in relation to the complaint.

[22] Regulation 86A(2) of the Education Regulations.

[23] Regulation 86A(3) of the Education Regulations.

[24] Regulation 86A(5) of the Education Regulations.

[25] The Education Ministry's own guidelines on dealing with cases of alleged inefficiency under regulation 86A state: "The normal definition of 'efficient' - which means to be 'competent, capable and effective' - applies to teachers...". MINISTRY OF EDUCATION WESTERN AUSTRALIA, PROCEDURES FOR GRIEVANCE RESOLUTION, COMPLAINTS, INEFFICIENCY AND MISCONDUCT 32 (NOVEMBER 1990).

[26] *See supra* note 18.

[27] Section 7C(3) of the Act.

[28] Section 7C(4) of the Act. Section 7C(5) provides that where an inquiry is being held pursuant to the provision or where a teacher has been charged with a criminal offense and it appears to the chief executive officer that if the teacher is convicted of the charge the offense may be such as to constitute misconduct, the chief executive officer can suspend the teacher from duty. Section 7C(9) authorizes the chief executive officer to remove the suspension where, after the inquiry, he is not satisfied that the teacher was guilty of misconduct or where the teacher, having been charged with a criminal offense, does not plead guilty to, and is not found guilty of, the offense with which he has been charged or of another offense that appears to the chief executive officer to be such as to constitute misconduct by the teacher, or the charge against the teacher is not proceeded with. The section also contains provisions concerning the payment of salary during suspension.

[29] Section 7C(12)(a) of the Act. The punishments that can be imposed by the chief executive officer include a reprimand, a fine not exceeding $200.00, a transfer at the teacher's own expense, a reduction in the teacher's salary grade, a reduction from one position to another carrying a lower salary or remuneration, and a suspension without pay for up to 12 months. Section 7C(12)(a) also authorizes the imposition of one or more of the punishments.

[30] Section 7C(12)(b) of the Act.

[31] Section 7C(13) of the Act.

[32] For an outline of the industrial relations system in Western Australia *see* BROWN, INDUSTRIAL RELATIONS LAW (2nd ed. 1992). The terms and conditions of employment of government school teachers in Western Australia have traditionally been governed by provisions set out in both the Act and the Education Regulations and by awards handed down by the Government School Teachers Tribunal as the body authorized by section 78(1)(a)(i) of the Industrial Relations Act to "inquire into and deal with any industrial matter [as defined in the Act] relating to [teachers]".

[33] Section 74. The Government School Teachers Tribunal is constituted by a Commissioner, who is a Commissioner of the Western Industrial Relations Commission, a person nominated by the Minister for Education, and a person nominated by the Teachers' Union. It is a constituent authority of the Western Australian Industrial Relations Commission, the body authorized to take control of and regulate, as and when required, the industrial relations of employers and employees generally throughout the state.

[34] Section 78(1)(b)(iii) of the Industrial Relations Act.

[35] Section 78(1)(b)(iiia) of the Industrial Relations Act.

[36] Section 79(3) of the Industrial Relations Act.

[37] *See supra* text accompanying notes 34-35.

[38] 67 W.A.I.G. 1124 (1987). Milentis, a teacher, had been dismissed for misconduct and had appealed against his dismissal. *See infra* text accompanying notes 94-95.

[39] The Full Bench of the Industrial Relations Commission is authorized by section 27(1)(u) of the Industrial Relations Act to hear and determine any question of law referred to it by the Government School Teachers Tribunal. After a number of postponements, the question of the nature of an appeal pursuant to section 78(1)(b)(iii) was raised by the Teachers' Union who had been granted leave to intervene in the case of Milentis v. Minister for Education, No. T 9 of 1986.

[40] 67 W.A.I.G. 1124 at 1125. In the Full Bench's view, in a strict appeal the question is whether the judgment complained of was right when given, and that will involve an examination by the appeal body of the judgment of the lower court. In a hearing *de novo*, the appellant is required to start again and has to make out the case again and call witnesses. In a rehearing the appeal body rehears the case on the evidence used in the court below but can also receive further evidence if the case requires it. *Id.*

[41] *Id.* at 1125-1126. For example, the Full Bench felt that because section 78(1)(b) also allows an appeal by a teacher against the salary level set at the time of appointment, which right of appeal could not be dealt with in a meaningful way if the appellant was restricted in the material he could put before the Tribunal, an appeal pursuant to section 78(1)(b)(iii) must attract a similar approach. *Id.*

[42] *Id.* at 1126.

[43] 69 W.A.I.G. 2930 (1989).

[44] *Id.* at 2934. The Industrial Appeal Court is the court constituted to hear appeals from a decision of the Full Bench of the Industrial Relations Commission on the ground that the decision was erroneous in law or was in excess of jurisdiction, pursuant to section 90(1) of the Industrial Relations Act.

[45] *E.g.*, McGarry v Minister for Education 69 W.A.I.G. 3436 (1989). The teacher, who had been a deputy principal at a high school, was reduced to the position of teacher by the chief executive officer for inefficiency. The original notice of appeal sought a declaration that the charges of inefficiency were not proven or substantiated, but before the Tribunal heard the appeal the notice of appeal was amended to limit the appeal to one against the demotion.

[46] In addition to hearing an appeal by way of a rehearing, the Tribunal is authorized by section 26 of the Industrial Relations Act to determine its own procedures. It is not bound by the rules of evidence, for example, but may inform itself in such a way as it thinks fit. The Tribunal also considers itself bound by the rules of natural justice - *see, e.g.*, McGavin v. Minister for Education, No. T 8 of 1990 (April 11, 1991).

[47] WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION, TWENTY-EIGHTH ANNUAL REPORT 15 (1991).

[48] No. T 4 of 1991 (September 25, 1991). The case involved an appeal by a teacher against his dismissal for misconduct. The question of the meaning of section 80A(5) was raised by the Tribunal itself.

[49] The Tribunal accepted that both the Teachers' Union and the Minister for Education were in agreement that there were significant public interest reasons for having the results of appeals published. The Tribunal also felt that section 80A(5) was at odds with various provisions in the Industrial Relations Act, which included the requirement to conduct hearings in public, to meet the requirements of a court of record, and to publish decisions.

[50] Section 80A(5) is directed at the Tribunal. It is possible, of course, for parties to the appeal to make available copies of the decision, but such a gesture is at their complete discretion.

[51] 70 W.A.I.G. 259 (1989).

[52] *Id.* at 261.

[53] *Id.*

[54] *Id.*

[55] *See, e.g.*, Donners v. Minister for Education, 67 W.A.I.G. 1910 (1987); Shepherd v. Minister for Education, 70 W.A.I.G. 259 (1989).

[56] Shepherd v. Minister for Education, 70 W.A.I.G. 259 (1989).

[57] McGarry v. Minister for Education, 69 W.A.I.G. 3436 (1989).

[58] Shepherd v. Minister for Education, 70 W.A.I.G. 259 (1989).

[59] *Id.*; *see* also McMillan v. Minister for Education, No. T 5 of 1991 (January 29, 1992); Donners v. Minister for Education, 67 W.A.I.G. 1910 (1987).

[60] *See, e.g.*, Shepherd v. Minister for Education, 70 W.A.I.G. 259 (1989); 43; McMillan v. Minister for Education, No. T 5 of 1991 (January 29, 1992).

[61] State School Teachers' Union of Western Australia (Inc.) v. Minister for Education, 66 W.A.I.G. 1871 (1986).

[62] But *cf.* the Education Ministry's own guidelines, *supra* note 25.

[63] This has been labeled the 'multiple cause' theory. Riley, *Teacher Incompetency: Bases for Dismissal,* 8 UNICORN 250, 252 (1982).

[64] *E.g.*, In McGarry v. Minister for Education, 69 W.A.I.G. 3436 (1989), it was alleged that the teacher was inefficient only in his role of deputy principal, while in the position of Senior Master (Science) which he held prior to his appointment as deputy principal, he had carried out his duties satisfactorily and competently.

[65] *See supra* note 18.

[66] No. T 8 of 1990 (April 11, 1991).

[67] *Id.* at 19-20.

[68] *Id.* at 8.

[69] *Id.* at 20.

[70] 67 W.A.I.G. 681 (1986). The teacher concerned was a Mr. Pryce. He pleaded guilty to an offense of having in his possession a utensil for use in connection with the smoking of a prohibited plant, having detectable traces of the prohibited plant cannabis, contrary to the Misuse of Drugs Act 1981 (W.A.). At the time of the alleged offense he was employed at a high school in a country town in the north-west region of the state. The offense had been discovered by the police when, in execution of a warrant to search for drugs, they entered the house in which the teacher and other people resided.

[71] *Id.* at 682.

[72] *Id.* at 682-684. *See* also *infra* notes 79-81 and accompanying text.

[73] *Id.*

[74] No. T 2 of 1991 (May 31, 1991).

[75] The deputy principal was responsible for supervising the students in a classroom during a school concert. He was called away from the classroom on a number of occasions, and during his absence on one occasion the video "Nightmare on Elm Street Part 2 - Freddie's Revenge" was put into the video receiver. The video had been brought to the school by an unidentified student. When the deputy principal returned to the classroom he did not realize what video the students were watching.

[76] No. T 2 of 1991 at 11 (May 31, 1991).

[77] No. T 4 of 1991 (September 25, 1991).

[78] *Id.* at 13-14.

[79] *See supra* text accompanying notes 8-18.

[80] The 1981 provision provided that a teacher was guilty of misconduct if he engaged in disgraceful or improper conduct whether during or connected with his employment as a teacher or not.

[81] The 1983 provision provides that the conduct complained of must occur "in his official capacity or otherwise by reason of which he ceases to be a fit and proper person to hold office as a teacher".

It should be pointed out that the phrasing "by which he ceases to be a fit and proper person to hold office as a teacher" is itself problematical. One of the curiosities of section 7C(2)(e) is that one might be tempted to believe that if a teacher has engaged in conduct "by reason of which he ceases to be a fit and proper person to hold office as a teacher", any penalty other than dismissal would be inappropriate. And yet section 7C(12) of the Act allows for the imposition of a lesser penalty even though the teacher has engaged in conduct "by reason of which he ceases to be a fit and proper person to hold office as a teacher". *E.g.*, in Pryce, 67 W.A.I.G. 681 (1986), despite being found guilty of conduct by reason of which the teacher ceased to be a fit and proper person to hold office as a teacher, the penalty imposed by the Ministry of Education and affirmed by the Tribunal was transfer to another school, rather than dismissal.

[82] *See, e.g.*, PEARCE, STATUTORY INTERPRETATION IN AUSTRALIA, 28-29 (2nd ed. 1981).

[83] Such considerations suggest that section 7C(2)(e) should be read:

> a teacher is guilty of misconduct
>
> (i) if he engages in disgraceful or improper conduct in his official capacity,
>
> or
>
> (ii) if he engages in disgraceful or improper conduct in any other capacity or way by reason of which he ceases to be a fit and proper person to hold office as a teacher.

[84] 67 W.A.I.G. 681 (1986).

[85] *Id.* at 686.

[86] No. T 8 of 1990 (April 11, 1991).

[87] *Id.* at 19-21. It is interesting to compare the *Schneider* case where the failure to supervise the watching of a video was found not to amount to misconduct. *See supra* text accompanying notes 74-75.

[88] 70 W.A.I.G. 258 (1989).

[89] No. T 4 of 1991 (September 25, 1991).

[90] *Id.* at 9.

[91] *Id.* at 10.

[92] No. T 1 of 1992 (July 17, 1992).

[93] *Id.* at 12-13.

[94] No. T 9 of 1986 (January 4, 1991).

[95] After five years of delay and litigation initiated by the teacher concerning various matters the Minister for Education sought to have the case dismissed on the grounds that the proceedings were not in the public interest, pursuant to section 27(1)(a)(ii) of the Industrial Relations Act. The Tribunal granted the order sought.

[96] *See,* generally, FORBES, DISCIPLINARY TRIBUNALS (1989); HOTOP, PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW (6th ed. 1985).

[97] *E.g.,* McMillan v. Minister for Education, No. T 5 of 1991 (January 29, 1992); McGavin v. Minister for Education, No. T 8 of 1990 (April 11, 1991); Vincent v. Minister for Education, No. T 4 of 1991 (September 25, 1991); Partington v. Minister for Education, No. T 1 of 1992 (July 17, 1992); Milentis v. Minister for Education, No. T 9 of 1986 (January 4, 1991).

[98] *See supra* text accompanying notes 19-31.

[99] *See supra* note 25.

[100] In McGavin v. Minister for Education, No. T 8 of 1990 (April 11, 1991) at 17, the Tribunal took the view that a consideration of whether the procedures adopted by the employer constituted 'a fair go all round' would include an ascertaining of whether the employee was informed of any allegation of misconduct, whether the employee had reasonable opportunity to answer such allegations and whether these were duly considered by the employer before the decision to dismiss was taken.

[101] Partington v. Minister for Education, No. T 1 of 1992 (July 17, 1992) at 12.

[102] No. T 5 of 1991 (January 29, 1992).

[103] The chief executive officer had instigated the processes involved in regulation 86A after receiving only one report about the teacher, and the teacher had not been given the opportunity to respond to allegations raised in the report.

[104] The Tribunal gave substantial weight to the second report that the teacher was inefficient and emphasized that the evidence in that report was limited to considerations in the workplace to which the teacher had been given the opportunity to respond.

[105] The Ministry of Education does not keep statistics on the number of cases of inefficiency and misconduct with which it has had to deal; nor, for example, does it keep records of how many teachers have simply accepted their fate and not sought Tribunal review of the decision of the Ministry to punish them either for misconduct pursuant to section 7C of the Act or for inefficiency pursuant to regulation 86A of the Education Regulations.