

The Legal Context of Australian Education: An Historical Exploration

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Abstract

This brief historical exploration of the legal context of Australian education in the nineteenth and twentieth centuries seeks to identify the key features of the development of the colonial and national political structures and of the development of the colonial and national legal systems. The colonial constitutions and their legislative inheritance, the colonial legal systems, and the consequences of their establishment, and the key developments in the provision of education in the nineteenth century are described. It explores for the nineteenth century emergent areas of litigation in education which concerned parents, and pupils and teachers. However, more research is needed before definitive explanations can be given to some of the questions which this exploration raises. Developments in education from 1910 to 1945 and Commonwealth-State relations and education to 1950 are then outlined. The litigation which involved parents and pupils, teachers and other matters in education during the period from 1910 to 1950 is noted. Contemporary developments in the legal context of education are briefly described. Some contemporary litigation affecting school education and higher education are described. An important feature of the development of the legal context of education since the 1970s has been the passing of legislation which confers on individuals statutorily enforceable rights referable to the provision of education and to employment in education. The implications of this for the growth of litigation in Australian education are discussed. In conclusion, it is submitted that it is not possible, without further detailed research, to say whether or not the contemporary developments in the legal context of education are leading to a growth of litigation in education which is greater than the increase in litigious activity in the community generally.

Introduction

In the hundred years from 1790 to 1890 the Australian colonies grew from one penal settlement in New South Wales to six sovereign colonies, each of which had its own legal system and its own system of representative and responsible government established under its own Constitution Act. These provided for representative and responsible government in the Westminster tradition. The legal context of nineteenth century Australian education was constituted by the development and operation of those legal and political systems. The colonial parliaments were responsible for establishing the legislative framework for education in the second part of the nineteenth century in

Australia. The movement for federation of the Australian colonies began during the final decades of the nineteenth century. Its culmination was the passing of the imperial *Constitution Act 1900*.¹ A federal model was adopted for the Commonwealth Parliament. The Constitution provided for responsible government and for the powers of the executive and of the legislature, which consisted of the Senate and the House of Representatives. It also provided for the separation of powers between the executive, the legislature and the judiciary. There were some exclusive Commonwealth powers, and s 51 provided for the powers which would in the future be concurrently held by the Commonwealth and the States. It also provided for the establishment of a federal court system. Power relating to education remained with the states, but the development of the legal context of education in twentieth century Australia has been affected by the nature of the development of the federal system of government and the federal legal system.

This brief historical exploration of the legal context of Australian education in the nineteenth and twentieth centuries seeks to identify the key features of the development of the colonial and national political structures and of the development of the colonial and national legal systems. It also describes the key developments in the provision of education in the nineteenth and twentieth centuries. It explores for the nineteenth century emergent areas of litigation in education, insofar as these can be identified from the reported decisions. Some of these cases are described in detail and the general trend of litigation is analysed. For the twentieth century emergent streams of litigation which have developed, particularly during the final decades, are identified. This survey is more general, because of the limits of space. Nevertheless, some of the twentieth century cases will be identified and noted although, in several areas of law where there are clearly identifiable streams of litigation emerging, individual cases will not be cited. While tentative explanations of these twentieth century developments can be suggested, there is need for more research to provide an adequate explanation of why some litigation has occurred and is continuing to occur. Finally factors in the legal system itself which are relevant to the development of litigation are noted.

The materials used this introductory exploration come from several sources. The primary sources are the statutes and the case law. The legislation includes that by which both the legal systems and the education systems were established. The constitutional legislation of the States and Territories and the Commonwealth is also relevant. The case law is drawn from *The Australian Digest* (second edition), volumes 1 to 46 of which provide summaries of cases published in Australian law reports from 1825-1984, and its further supplements and monthly digests since 1984. Other modern specialised series of reports have also been used in the discussion of contemporary trends in litigation in education. Secondary source material has been drawn from a selection of the work of recent historians of education and of law, and from legal commentators.

Nevertheless a word of warning is necessary. Adequate as the range of source material used has proven to be for the exploratory purposes of this brief introductory study, it does not necessarily cover all the potential sources which might be available. For example, the cases reported in law reports are those of superior courts, but not all cases heard in these courts are reported. These unreported decisions remain a significant potential source. Other examples of

potential historical sources are newspapers and archival records. Newspapers are a potential source of information, because there may well be reports of cases heard in the lower courts. Archival records, both those relating to the legal systems and those relating to education systems, and indeed those of individual educational institutions, may also prove to contain significant materials. Further, historians understand that the obvious sources do serendipitously lead to less obvious ones, and it is unlikely that these examples of potential sources have 'covered the field'. To explore some of these potential sources for just one jurisdiction would be a significant research task, but until this is done the tentative suggestions made in this study remain merely that: tentative suggestions which may provide a useful map for future historians of the legal context of Australian education.

The Colonial Constitutions and the Legislative Inheritance

The development of the constitutions of the Australian colonies occurred between 1842 and 1890. The imperial *Australian Constitutions Act (No 1) 1842*ⁱⁱ enabled the establishment of the first representative Legislative Council in New South Wales. In 1850 under another imperial act, the *Australian Constitution Act 1850*ⁱⁱⁱ legislative councils were established in Victoria, Van Diemen's Land, South Australia and Western Australia, and with the New South Wales Legislative Council, were asked to prepare their own Constitution Acts, which were not to touch upon certain controversial matters. In New South Wales and Victoria, where the Constitution Bills went beyond the limits of the 1850 imperial act, a further imperial act was required to enable the Royal Assent to be given to the bills. The resulting legislation was for New South Wales, the imperial act, the *New South Wales Constitution Act 1855*^{iv} and the (NSW) *Constitution Act 1855*.^v For Victoria the *Victorian Constitution Act 1855*^{vi} and the (VIC) *Constitution Act 1855*^{vii} were required. In Tasmania, the Act was the (TAS) *Constitution Act 1855*.^{viii} In South Australia there was the (SA) *Constitution Act 1856*.^{ix} Under the *New South Wales Constitution Act 1855*^x the Queen-in-Council was empowered to permit Queensland to be separated from New South Wales, and this Order-in-Council of 6 June, 1859 enabled the Governor of Queensland to make laws for Queensland. Some three decades later the (WA) *Constitution Act 1889*^{xi} and the imperial *Western Australia Constitution Act 1890*^{xii} were passed (Hanks, 1980: 2-3).

Generally speaking these Constitution Acts provided for bicameral legislatures, with an upper house elected on a property franchise, or nominated by the governor, and for a lower house elected on a more popular, but still restricted franchise. It was these colonial parliaments which were responsible for establishing the legislative framework for education in nineteenth century Australia. Their legislative inheritance from England did include a long tradition of legislative intervention in dealing with problems of vagrant and destitute children, particularly through the Poor Laws. Parental rights would be overridden if the security of the state and the welfare of the child were threatened (Pinchbeck & Hewitt, 1969: vol 1). However, this inherited tradition did not by the end of the eighteenth century extend to legislative intervention for the provision of education for children generally. This was a matter for the parents, whatever their class or status.

The provision of schooling was left therefore to the churches, to voluntary philanthropic societies, and to private individuals (Pinchbeck & Hewitt, 1973: vol 2).

The legislative inheritance of the Australian colonies also included the humanitarian reforms which led in England in 1833 to the abolition of slavery. The reformers were also concerned about the treatment of the indigenous peoples of the Empire (Reynolds, 1992: 81-102). Attempts were made by the humanitarian reformers at the Colonial Office during the 1830s and 1840s to recognise Aboriginal land rights by directing the Australian colonies to provide for reserves, to recognise usufructuary rights on Crown lands, and under the *Imperial Crown Land Sale Act 1842*^{xiii} to include in the exceptions of lands required for public uses, land for the use or benefit of the Aboriginal inhabitants of the country. During this period the first Protectors of Aborigines were appointed in Port Phillip, South Australia and Western Australia, and Crown Lands Commissioners were appointed in New South Wales. Missionary activities were also supported by government (Felton, 1969: 4-5; Reynolds, 1972: 151-156; 1992: 203-248). The directions of the Colonial Office were not to prove effective (Reynolds, 1972: 156-162; 1992: 148-172), and Aboriginal resistance to the invasion and settlement of Australia would continue throughout the nineteenth century (Ellis & Ellis, 1982: 115-119, 126-129; Reynolds, 1981).

The Colonial Legal Systems

The Australian colonies were considered to be founded by settlement and to have received such English legislation and case law as was applicable to the colonial environment at the time of settlement. In one important matter, however, there was no immediate acknowledgement of the implications for Australian jurisprudence of the reception of English law: the recognition of the rights of the indigenous people to the tenure of their land (Reynolds, 1992).

The circumstances and the dates of the formal reception of English law varied from colony to colony. Plans for the administration of law and justice in New South Wales were set out in the First Charter of Justice in 1787. During the period from 1788 to 1823, when the governors of New South Wales exercised both executive and legislative powers, a court system and a magistracy based on those of England, were established. The Second Charter of Justice in 1814 provided for a Supreme Court. In 1823, following the Second Report of Commissioner J T Bigge, *Report of the Commissioner of Inquiry on the Judicial Establishment of New South Wales*, the *New South Wales Act 1823*^{xiv} set up a nominated Legislative Council, but the power to introduce legislation remained with the Governor and all laws had to be reviewed by the Chief Justice to ensure that they were consistent with the laws of England. The *Australian Courts Act 1828*,^{xv} subsequently made permanent by the *Australian Constitutions Act 1842*,^{xvi} provided that 25 July, 1828 became the date of reception of English law into New South Wales and Tasmania, which had separated in 1825 (Castles, 1982: 90-117, 124-152, 252-293).

The reception of English law and the establishment of court systems in the other colonies occurred between 1829 and 1861. English law is held to have been received in Western Australia on 1 June, 1829, with Captain Stirling's arrival on the banks of the Swan River. An imperial act,

the *Government of Western Australia Act 1830*,^{xvii} provided for a nominated legislature empowered to establish courts. This was done, and a Supreme Court was established in 1861 (Castles, 1982: 294-310). South Australia was set up under the *South Australian Colonisation Act 1834*.^{xviii} The province was proclaimed by an Order in Council of 28 December, 1836, which the South Australian Colonial Ordinance No 2 of 1843 provided was to be the date of reception of English law in that colony. The South Australian *Supreme Court Act 1837*^{xix} established the Supreme Court (Castles, 1982: 310-325). In the Port Phillip District, 1836 saw the appointment of Captain William Lonsdale as Police Magistrate, and 1841 saw the appointment of the first Supreme Court judge.

However, when Victoria separated, under s 25 of the imperial *Australian Constitution Act 1850*^{xx} New South Wales laws were to continue in Victoria, and in 1851 the New South Wales legislature passed an Act^{xxi} which provided for 2 May, 1851 to be the effective date for the reception of English and New South Wales law in that colony. The Victorian legislature passed the *Supreme Court (Administration) Act 1852*^{xxii} to establish the Supreme Court (Castles, 1982: 228-251, 332-333; Campbell, Glasson & Lahore, 1979: 50-51, 72-78). In 1838 a police magistrate was appointed to the Moreton Bay District. From 1850 Brisbane was a site of Supreme Court circuit sittings, and a permanent Supreme Court was established in 1857. Queensland was separated from New South Wales under an imperial Order of Council of 6 June, 1859, which provided that the laws in New South Wales should continue in force in Queensland, thus encompassing both English law and New South Wales law (Castles, 1982: 218-228; Campbell, Glasson & Lahore, 1979: 72-78).

Some Consequences of the Establishment of the Colonial Legal Systems

Five consequences of the circumstances of the establishment of the legal systems of the Australian colonies may be briefly noted. Firstly, a magistracy and a judiciary were established in all of the colonies. Secondly, a hierarchy of courts, headed by an inherently powerful Supreme Court, which inherited the jurisdictions of the various contemporary English superior courts, was established in each colony. The procedures used in the English courts were adopted, adapted and developed to suit colonial circumstances. English case law became the source of precedent. However, after 1825 as the colonial Supreme Courts developed the first colonial law reports were published (Campbell & MacDougall, 1967: 21-26). Thirdly, an embryonic legal profession which would mature with the further development of the court systems, was established. Fourthly, the sources of Australian law were clearly defined: the statute law passed by the colonial legislatures, which in many instances followed English statutes, and the case law, which included both English case law and that determined by the colonial Supreme Courts. (Castles, 1982: 326-377).

The fifth consequence was that the Australian colonies inherited the common law and equitable principles relating to parental control and the education of children. At common law, a father was not bound to provide education for infants: *Hodges v Hodges* (1796) Peake Add Cas 79; 170 ER 201. It was thought that in some circumstances there was a natural right for a child to

be given an education suited to his station in life, but this was not a right enforceable at law (Gamble, 1981: 11). Children were effectively little more than chattels of parents (Gamble, 1981: 7). The reception of English law also brought with it tort law and contract law, and of course equity. From the Crown's powers as *parens patriae*, there emerged over the centuries the equitable jurisdiction, which although it was originally concerned with the protection of the property rights of wealthy infants (Kovacs, 1981), had powers to act in the interests of the welfare of the child (Gamble, 1981: 2). The Courts of Equity developed principles which governed the proper exercise by legal guardians of their discretion as to the education of wards. For example, the guardian had to choose a proper school, and a court would enforce this: *Hall v Hall* (1749) 3 Atk 721; 26 ER 1213, and it was expected that the infant would be properly educated according to his rank and expectations: *Powell v Cleaver* (1789) 2 BCC 499; 29 ER 274 (Simpson, 1909: 218-219).

Education in the Australian Colonies 1788 to the 1870s

There were apparently no expectations concerning the education of the seventeen children of convicts and the nineteen children of marines in the First Fleet. Unlike the provision for the administration of law and justice made in the First Charter of Justice, no provision had been made for the education of these children. As the numbers of children grew to 1,831 by 1807, the early governors were constrained to establish schools using whatever physical and human resources they could find (Austin, 1972: 1-9). Governor Macquarie in 1814 provided finance for a school for Aboriginal children, but it was not successful in attracting pupils (Cleverley, 1971: 101-116). In 1821, Commissioner J T Bigge, in his First Report, *Report of the Commissioner of Inquiry into the State of The Colony of New South Wales* (1822) was particularly critical of the profligate parents of New South Wales. He wrote of the importance of developing the education system so 'that as little control as possible shall be left to the parents over the time, the habits or the disposition of their children' (Griffiths, 1957: 27-28).

Despite the cessation of transportation and the encouragement of the immigration of free settlers from the 1830s, extending the system of education proved a difficult task in the rapidly developing Australian colonies. The Church and School Corporation was set up in New South Wales in the late 1820s. It was shortlived. The physical difficulties in surveying the land which was to be given to it and the vociferous opposition in the infant colony to the establishment of the Anglican Church assisted its demise (Austin, 1972: 9-27). During the 1830s and the 1840s attempts to introduce the Irish National System of Christian non-denominational schools, and the British and Foreign School Society system, foundered on the rocks of sectarianism. In the late 1840s the Dual System was tried. State aid was given to denominational schools, controlled by the Denominational Schools Board, and the National Schools Board supervised the establishment of non-denominational schools, which allowed ministers of religion to provide denominational religious instruction at specific times (Austin, 1972: 33-67).

After 1850 this Dual System was adopted in the newly separated colonies of Victoria, Tasmania and Queensland. It was also adopted in Western Australia. Only South Australia, had by

1850 resolutely decided against the provision of state aid to denominational schools (Austin, 1972: 72-107). The Dual System, however, proved less than satisfactory. Schools proliferated in the more populous centres of settlement, but it failed to provide adequately for schooling throughout the colonies. Consequently, during the 1860s Compromise Acts were passed in the several colonial legislatures to bring the state-aided denominational schools and the national schools under the control of single boards in each colony. These acts were: *Education Act 1860 (QLD)*,^{xxiii} *The Common Schools Act 1862 (VIC)*,^{xxiv} *Public Schools Act 1866 (NSW)*,^{xxv} *The Public Schools Act 1868 (TAS)*^{xxvi} and *The Elementary Education Act 1871 (WA)*.^{xxvii} Two distinctive characteristics of nineteenth century Australian school education had been shaped in the period prior to 1870: the role of the state in the provision of public education, and the coexistence of denominational schools alongside wholly state-supported non-denominational schools.

Nevertheless, complaints about the state of school education in the colonies continued to be heard. Investigations were undertaken in New South Wales, Victoria and Queensland between 1867 and 1879. Extensive truancy was reported in the cities. In country areas drought, sickness, the need for children's services, distance, bad roads, and parental indifference to the education of their children were some of the reasons given for children's non-attendance at school (Griffiths, 1957: 134-140).

If there were reasons for concern about the education of the settlers' children, there were during this period even more reasons for concern about the indigenous children. Firstly, there was the widespread disruption of traditional Aboriginal education provided by the tribal elders (Ellis & Ellis, 1982: 136; Reynolds, 1972). Secondly, there is evidence in some reports of the Protectors of Aborigines and in evidence given to select committees of colonial parliaments that attempts were made during the 1840s, 1850s and 1860s by colonial governments, and by missionaries and philanthropists to provide schools on reserves and in the major settlements did not achieve their aims (Felton, 1969: 6; Reynolds, 1972: 46, 50, 117-120, 156-160) .

School Education in the Australian Colonies From the 1870s to 1910

The compulsory education legislation

Between 1872 and 1895 all the Australian colonies sought to resolve the problems of providing education by the introduction of free, compulsory and secular education. These acts were: *Education Act 1872 (VIC)*,^{xxviii} *The Public Schools Amendment Act 1873 (TAS)*^{xxix} *The Education Act 1875 (SA)*,^{xxx} *State Education Act 1875 (QLD)*,^{xxxi} *Public Instruction Act 1880 (NSW)*,^{xxxii} and the *The Elementary Education Act 1871 Amendment Act 1894 (WA)*.^{xxxiii} This legislation effectively removed the common law parental right to determine whether or not a child should be given a formal education. An affirmative duty to secure the child's education was placed upon parents, and penalties were imposed upon parents who failed in this duty. 'Parent' in these acts was widely defined to include anyone with actual custody of the child. Attendance at a public school for secular instruction for a given number of days annually was made compulsory for

children between certain ages unless there was a reasonable excuse. The age range varied from jurisdiction to jurisdiction, but was usually from six to fourteen years. The acts generally provided that sickness, fear of infection, temporary or permanent infirmity, or other unavoidable cause, residence beyond a certain distance from a public school, the possession of a certificate of an acceptable standard of education, or receiving efficient instruction elsewhere constituted a reasonable excuse.^{xxxiv}

The introduction of the compulsory education legislation was attended by some controversy, and it is not surprising, given the existence of denominational schools which had been receiving state aid, much of the controversy centred on the provision of secular education (Austin, 1972: 173ff; see also Portus, 1937; Wyeth, nd; Hyams and Bessant, 1972; Grundy, 1972, Barcan 1981). Two results flowed from this controversy. In the first place, there was included in some of the colonial legislation provision for non-denominational general religious education within the secular education to be offered by government schools. Parents were, however, enabled to withdraw their children from these classes.^{xxxv} Legislation in other colonies was unequivocal in its exclusion of religious teaching of any kind from the secular education offered in public schools during school hours.^{xxxvi} In the second place, state aid for denominational schools was abolished. In some colonies this was achieved in the compulsory education legislation by the specific direction of public funds to government schools only, but in other colonies a phasing out of state aid occurred and special abolition of state aid provisions were passed.^{xxxvii} Taken together these aspects of compulsory education legislation meant that although the parental common law right to determine the religious upbringing of children remained intact, those parents who wished denominational religious instruction to form an integral part of their children's formal education had to look to non-government schools.

Another significant consequence of the compulsory education legislation was the formation of colonial education departments. This meant that whereas teachers in denominational schools continued to be employed by the governing authority of the school, teachers in the education departments found themselves part of government teaching services, which provided similar employment conditions to the general civil service or public service which was developing in each colony during the nineteenth century.

Education of indigenous children

The provision for the education of indigenous children depended upon the development of government policy of the particular colony (Ellis & Ellis, 1992: 136; Reynolds, 1972: 156-165). It is not possible within the scope of this paper to describe these developments in detail, but in general terms this was a period in which only a minority of Aboriginal people were able to maintain their tribal lifestyle. Colonial government policy centred on protection and segregation and most Aboriginal people lived on reserves (Ellis & Ellis, 1992: 121-122). The provision of formal education for children on the mission stations and government reserves was very limited (Reynolds, 1972: 66; Ellis & Ellis, 1992: 122). This educational provision was not of the same

standard as that provided for white children, and this situation persisted into the twentieth century (Ellis & Ellis, 1992: 136).

The extent to which there was any governmental response to the obligations of the compulsory education legislation was limited. In Victoria, where assimilation had become the preferred policy for part-Aboriginal people (Reynolds, 1972: 172), all the mission and station schools were controlled by the Education Department by 1891, and when part-Aboriginal families were excluded from the reserves, the children attended their local schools (Felton, 1969). This was not the situation in other colonies, where acceptance of responsibility by the education departments was not to occur until well into the twentieth century.

In the Torres Strait Islands, the London Missionary Society introduced schooling as part of its missionary endeavour in 1873, but ultimately withdrew from the Islands in 1914. Government intervention had commenced with the establishment in 1892 of a Provisional school, which was not provided by the Queensland Department of Public Instruction, but partly by the Home Secretary's Department and by the Islander communities themselves (Williamson, 1994: 1-68).

Educational Trends At the Turn of the Century

Detailed analysis of the subsequent colonial and state education legislation cannot be included within the limits of this paper, but two points may be made. Firstly, some of the subsequent colonial education legislation was influenced by developments in English education legislation well into the twentieth century.^{xxxviii} Secondly, there was continued concern about the effectiveness of the compulsory attendance provisions and many complaints about truancy in the colonies (Austin, 1972: 238-241). By the turn of the century the criticisms of the public education system had led to major commissions and inquiries in Victoria, New South Wales, Tasmania, South Australia and Queensland between 1899 and 1909 (Austin, 1972: 270-277). In general terms what emerged from these reviews of state education systems was the improvement of primary education, the development of government secondary schools, and the development of technical education.

Compulsory primary school education was not the only significant development in school education by the end of the nineteenth century. Denominational schools, primarily Catholic primary and secondary schools, continued to grow (Fogarty, 1959). Other secondary schools, including the public schools established by the major Christian denominations and the partially government supported public grammar schools established in Queensland from 1860, also continued to develop. The growth of structured secondary education, initially to meet the matriculation requirements of colonial universities, and subsequently to meet the requirements of public examination systems was also significant.

Legislation was passed to establish universities: the *University of Sydney Act* 1850,^{xxxix} the *University of Melbourne Act* 1853,^{xl} the *Adelaide University Act* 1874,^{xli} and the *University of Tasmania Act* 1889.^{xlii} The University of Queensland was established in 1909 and the University

of Western Australia in 1911. Most, but not all of the university statutes included provision for the visitorial jurisdiction. After 1870 the first major technical colleges were also established, many as Schools of Mines. Sometimes their establishment was aided in part by endowments from philanthropic benefactors, and some were established by specific foundation statutes which provided for their organisation and management by their own councils (Murray-Smith, 1967). Finally, it may be noted that the nineteenth century Mechanics Institutes, concerned with self-improvement based on learning, played a key role in the development of adult education (Whitelock, 1974: 24-35, 85-133).

The Early Litigation in Education

Litigation in the superior courts began to emerge during the latter decades of the nineteenth century and the early decades of the twentieth century. But there was scarcely a flood of litigation, and on the whole most of it arose from the impact upon individuals of the various changes in the legislative framework governing education.

Parents and pupils

Perhaps not surprisingly, given the complaints about truancy, which if prosecuted would most likely have been dealt with in the magistrates' or lower courts, some cases were related to the compulsory education provisions of the Education Acts. In *R v Learmonth; Ex parte M'Kay* (1878) 4 VLR(L) 162 the legal issue concerned the evidentiary effect of a head teacher's certificate that parents had not sent a child to school, but there were more substantive issues in the interpretation of the compulsory education provisions in *Fleming v Greene* (1907) VLR 394; 28 ALT 212; 13 ALR 185. Greene was convicted of failing to cause his child to attend a state school. His defence was that the child was receiving efficient and regular instruction. In dealing with his appeal, Madden CJ said, at 396:

It is to be borne in mind that the first purpose of the Education Act in Victoria is that every child between the ages of 6 and 14 years shall be educated. There is no provision or intention that every child shall be educated in a State School. On the contrary, the Act itself manifestly contemplates that children may be educated in a State School, a private school or by means of private tuition. But every child not elsewhere educated must be educated in a State School. Then it follows from that and is manifest from the words of the Statute, that the being absent from a State School is not the gist of the offence. The real intention of the Legislature in this Act is plainly that the child who is absent from a State School but is efficiently and regularly instructed elsewhere is educated within the meaning of this Act. It is only on his absence from a State School, and not being efficiently and regularly instructed elsewhere, that any offence can ever arise.

The Chief Justice was critical of the Education Department which had not prescribed in regulations the 'quantum, quality and extent of instruction' as it was required to do by the *Education Act* 1890. This failure to prescribe regulations was serious, His Honour said at 400-401, for

the absence of regulations not only strikes at people like the defendant here, who choose to educate their children in their own home, but at the great body of those who choose to have them taught in public or private schools, because while the children were receiving the very best education in another school, the absence of a certificate of exemption under sec 4, would prevent such parents from avoiding a conviction by showing that their children were having efficient and regular instruction in the manner prescribed by sub-sec 4 of sec 3.

In this case the Court was clearly of the opinion that the compulsory principle did not negate parental choice as to how the child was to be educated, but did impose concomitant obligations upon those responsible for implementing the legislation to define what was meant by efficient and regular instruction in order to protect this parental choice. The Western Australian Supreme Court in 1925 confirmed that the power to determine what was efficient instruction lay with the Minister for Education. In *Minister for Education v Maunsell* (1923) 27 WALR 156 ministerial discretionary powers were held to override parental wishes. The Court held that under the (WA) *Public Instruction Act* 1899, s 71 gave the power to the Minister to compel Dr Maunsell, who had been educating his child at home, to send his child to a proper school. The affirmative duty placed upon parents to educate their children was clearly stated by the Victorian Supreme Court in the fourth of these early decisions in *Webster v Luchinger* (1917) VLR 254; 38 ALT 189; 23 ALR 115. The mother of a child prevented the child, born before her parents' marriage, from attending school. The Court held that the mother, but not the father, was liable for failure to fulfil this duty. This decision was consistent with English authority upon this point. For example, in *Hance v Burnett* (1880) 45 JP 54 the liability was held to fall upon the mother of a child where her seafaring husband was away, and in *London School Board v Jackson* (1881) 7 QBD 502 where the child was living with relatives.

Other litigation concerned the treatment of children in school. The tort of negligence seems to have first appeared in a reported decision in *Hole v Williams* (1910) 10 SR(NSW) 638; 27 WN 160. After an accident with a beaker of sulphuric acid, the plaintiff alleged negligence on the part of a chemistry teacher in a government school and sued the government for damages. The Full Court of the New South Wales Supreme Court found the teacher had been negligent, but that the Minister was protected by s 38 of the (NSW) *Public Instruction Act* 1880 and the government was not liable. The issue of corporal punishment was considered by the Queensland Supreme Court in several early decisions. In 1894, in *Smith v O'Byrne; Ex parte O'Byrne* 5 QLJ 126; QCR 252 the Full Supreme Court held that a teacher might lawfully impose moderate corporal punishment if the pupil was capable of understanding the punishment, but that excessive

punishment was unlawful. The *Queensland Criminal Code* came into force in 1901,^{xliii} and s 280 provided that it was lawful for a schoolmaster to use reasonable force in the correction of a pupil. A teacher who hit a pupil on the back of the thighs with a cane, when the pupil refused to answer questions, was convicted of assault and fined, but in *Sparkes v Martin; Ex parte Martin* (1908) 2 QJPR 12 Cooper CJ of the Queensland Supreme Court quashed the conviction. His Honour held that there was no evidence of excessive punishment or improper behaviour on the part of the teacher. The decision in *Armat v Little; Ex parte Little* (1909) QSR 83; 3 QJPR 21 also resulted in the quashing of a teacher's conviction, but this turned on the admissibility of the evidence of a medical practitioner. Of course, what these reported cases do not reveal is why they seem to have arisen only in Queensland. Did the successful reform of the criminal law, led by Sir Samuel Griffith, create interest in the issue of corporal punishment in schools? If this was the case, then why did not similar cases appear in the superior courts in Western Australia, which reformed its Criminal Code in 1902, or in South Australia and Victoria, where such codes were drafted but not enacted into law? (Castles, 1982, 486-489) Or was each case simply a particular response to a particular event? To answer the question of why litigation occurred requires further research.

Teachers

It is evident from the early reported decisions that some litigation involving teachers which occurred in the 1860s and early 1870s in Victoria seems to have arisen as a result of changes in the legislative framework of the provision of education. The *Common Schools Act* 1862 had abolished the National and Denominational Schools Boards and established the Board of Education. In September 1862 a proclamation had been issued that the *Civil Service Act* 1862^{xliiv} was not to apply to those whose salaries were or had been paid out of the education vote, that is those whose employment was linked to the work of the Board of Education. In *Geary v The Queen* (1865) 2 WW & A'B(L) 50 the plaintiff had been an inspector for the Denominational School Board, who had in August 1862 accepted an appointment with the new Board of Education. The appointment was confirmed in October 1862. He challenged the September 1862 proclamation. The Full Court of the Victorian Supreme Court held that he was no longer a member of the Civil Service, but that the September proclamation was prospective, and he did not lose any rights he held at the date of the proclamation.

Relations between a local school committee and the Board of Education were at issue in *Re Board of Education; Ex parte Stevenson* (1867) 4 WW & A'B (L) 133. The Local Committee of the Fitzroy Common School sought a writ of *mandamus* to compel the Board to provide money for the payment of teachers. The Full Court would not grant the writ because the teachers' payments were the responsibility of the local school committee, and the teachers' contracts were made with the Committee and merely approved by the Board. The contract between a teacher and the local committee was at issue in *O'Dowd v O'Doherty* (1873) 4 AJR 81. The agreement provided that the teacher's employment could be terminated on one month's notice, but s 14 of the *Common Schools Act* 1862 provided that the Board of Education had to ratify the dismissal of any teacher, and reference to this provision was noted at the end of the contract.

However, when the teacher was dismissed in 1872, the membership of the local committee had completely changed. The Board of Education refused to ratify the teacher's dismissal and the committee promptly removed the school from the control of the Board of Education. The issue was one of contract. Barry J held that the terms of the contract between the teacher and the committee had been met and that the reference to s 14 of the *Common Schools Act* 1862 did not form part of the contract.

Regulations made under the *Common Schools Act* 1862 were at issue in *Bourke v Board of Education* (1872) 3 VR(L) 148; 3 AJR 67. Section 10 of the Act limited the establishment of schools funded from consolidated revenue if there was an existing funded school within two miles. The Board of Education had issued a regulation that the existence of a school not vested in the Board would not be a bar to a request for the establishment of a Board of Education school, even though the granting of aid to the new school would result in a withdrawal of funding from the existing school. Lauriston Common School was a Catholic Denominational School, funded by the Board of Education from 1865 until 1871 when the funding was withdrawn, because in 1868 the Board had granted an application for the establishment of a vested school at Lauriston. The basis of the application for the new school was the absence of representation of other religious denominations on the school committee. The plaintiffs challenged the validity of the Board's regulation. Stawell CJ found that the regulation was invalid and contrary to s 10. Perhaps had local control of schools remained and state aid continued more litigation such as this would have continued, but in 1872 in Victoria local control of schools gave way to centralised control and state aid was abolished.

In Victoria at least, centralised control did not avoid litigation. As there were changes in the legislative provision for the organisation of the education system and in the public service employment of teachers, so did the subject matter of the litigation change. Section 22 of the *Education Act* 1872 s 22 provided for the appointment of teachers by the Governor in Council. In Victoria on 24 December, 1881 the *Abolition of Pensions Act* 1881^{xlv} was passed. It did not affect existing members of the public service, who were to receive their retirement allowances under section 42 of the *Civil Service Act* 1862. A new *Public Service Act* was passed on 1 November, 1883.^{xlvi} This Act provided that persons appointed after the passing of the *Abolition of Pensions Act* 1881 were not to receive a pension under the *Public Service Act* 1883, which was to apply only to persons appointed under it. This included teachers. Sections 43-57 and the Second Schedule provided for the classification of teachers, and ss 58-70 provided for the appointment of teachers.

A number of matters relating to teachers' superannuation benefits seem to have arisen from the timing of legislation. In *Mills v The Queen* (1888) 14 VLR 940; 10 ALT 148 the plaintiff was a teacher who had retired before the age of sixty after serving for fifteen years under the *Education Act* 1872. The Full Court of the Victorian Supreme Court held that he was not entitled to a retiring allowance, unless he could show that s 42 of the *Civil Service Act* 1862 applied to him. The quantum of the retiring allowance was to be calculated with reference to both the *Public Service Act* 1883 s 70 and the *Civil Service Act* 1862 s 42.

Some teachers appointed during the early 1880s had subsequently to resort to litigation to clarify their claims to superannuation.^{xlvii} In June 1879 Joseph Henry Jenkin passed the examination which qualified him to undertake unpaid teacher training under the *Education Act* 1872. In March 1880 he was appointed to the Castlemaine State School as a paid pupil in training. In July 1881 he passed the examination for entry to the Central Training Institute in Melbourne, where the Education Department told him to report in August 1881. He completed his training a year later and was appointed temporarily to schools in Blackwood and Richmond in 1882 and to the Vectis school in February 1883. His appointment by the Governor in Council did not occur until February 1883. In June 1920, after forty years of teaching, he issued a writ claiming entitlement to a pension, which was being refused him. In *Jenkin v A-G of Victoria* (1921) VLR 79; 42 ALT 141; 27 ALR 36 the plaintiff's claims were that his appointment as a teacher did not depend upon the appointment by the Governor in Council, or if it did, that as he had been employed as a teacher since March 1880 it was a reasonable inference that such an appointment had been made. The defendant's arguments were that as Jenkin's appointment as a teacher in February 1883 was after the passing of the *Abolition of Pensions Act* 1881 and before the passing of the *Public Service Act* 1883 he was not entitled to a pension, and that he had not been appointed as a teacher in March 1880 but as a pupil. The decision turned on the construction of the relevant provisions of the *Civil Service Act* 1862, the *Education Act* 1872, the *Abolition of Pensions Act* 1881, the *Public Service Act* 1883 and the *Public Service Act* 1915.^{xlviii} The Victorian Supreme Court held that Mr Jenkin has been a 'teacher employed in a State School' since March 1880, and that an appointment by the Governor in Council was not necessary, but if it had been necessary, it would be presumed to have been made at that time.

In *A-G for Victoria v Roberts* (1931) 46 CLR 1; 5 ALJ 277 the High Court also found for the respondent teacher. Mr Edward Henry Roberts had commenced as an unpaid pupil teacher in June 1881 at the school where he had been a pupil and a monitor because there was no immediate vacancy for a paid appointment. In July 1882 he was appointed by the Minister as a paid pupil teacher. When he retired in December 1929 he was told he was not entitled to the pension he sought under the *Civil Service Act* 1862. A majority of the High Court dismissed the Victorian government's appeal holding that he was a person appointed prior to 24 December, 1881 and that he was entitled to a pension.

Other elements of public service employment were also the subject of litigation between teachers and their employers. The classification of teachers under the Victorian public service legislation was at issue in *Main and Others v Stark* (1890) 15 App Cas 584, where the Privy Council upheld the decision of the Victorian Supreme Court in *R v Main; Ex parte Stark* (1888) 14 VLR 98 which had acknowledged Miss Stark's right to be classified as a teacher (Selleck, 1983). It was also at issue in *R v Committee of Classifiers: Ex parte Kennedy* (1896) 22 VLR 469, where the Supreme Court held the classifiers were right in not taking the teacher's service in a denominational school into account in determining the teacher's classification. In *Young v The Queen* (1897) 3 ALR 32 the timing of promotion in relation to the enactment of the *Teacher Salaries Act* 1893^{xlix} was the issue, and in *Murphy v The King* (1902) 27 VLR 540; 23 ALT 160; 8

ALR 13 the classification of a teacher and of a school were the issues in dispute. The only reported decision relating to misconduct by a teacher is *Foran v The Queen* (1890) 16 VLR 510; 12 ALT 54 where it was held that the Public Service Board was empowered to dismiss a teacher, even though the teacher's conduct had already been the subject of inquiry and sanction.

It can be suggested that the changing legislative framework of the provision of education in Victoria, and particularly the timing of the public service legislation, was one reason for the litigation which occurred in that colony. However, it is not possible within the scope of this paper to examine the passing of the public service legislation in the other colonies to see if it was simply the hiatus of the timing of the Victorian legislation which led to this litigation, and it would also be necessary to examine other archival sources to see if there were unreported decisions relating to similar matters in the other jurisdictions.

Developments in Education From 1910 to 1945

School education

During the first half of the twentieth century, the control of the provision of school education remained with the states. As far as government sector schools were concerned, there was consolidation of primary school systems in both urban and rural areas, and the further development of systems of government secondary schools, at which modest fees were generally payable for most of this period. Schools which offered specialised domestic science programs for girls were included in this development, as were post-primary technical schools, often for boys only. The centralised organisation of education remained a feature of the state and territory systems. Although amended education acts were passed, sometimes as the result of the consolidation of legislation in a particular jurisdiction, or to accommodate developments in what was becoming the increasingly more complex administration of school education, they were not significantly different in the conceptual basis of their jurisprudence from the nineteenth century legislation. The majority of non-government sector schools were Catholic primary and secondary schools, which generally charged low fees, and the minority were the independent schools where the fees were higher.

Education for indigenous children

Policies relating to the education of indigenous children seem to have varied from state to state during this period. For example, in Victoria and South Australia, the policy of assimilating part-Aboriginal persons had been adopted (Reynolds, 1972: 172), but in other states, protectionist and segregationist policies governed the treatment of the Aboriginal people, including the education of indigenous children. For example, in New South Wales, one such policy was the introduction in 1913 of an apprenticeship scheme for children on reserves and stations who were taken from the reserves into homes. The girls were trained in domestic science and the boys in farmwork. This

scheme continued until the end of the 1930s, when it was replaced by a policy of assimilation, which was not generally effective in relation to Aboriginal children's attendance at local schools (Ellis & Ellis, 1992: 137; Watts, 1981: 8-9). In 1904 in Queensland the Torres Strait Islanders were brought under the provisions of the *Aboriginals Protection and Restriction of the Sale of Opium Acts 1897-1901*¹ and protectionist and separatist policies similar to those followed in the provision of Aboriginal education on the Queensland reserves were favoured (Williamson, 1994: 69-84). In the Northern Territory, administered by South Australia from 1863-1911, the schools provided were mission schools. After 1911, when the Commonwealth took over the administration of the Territory, protectionist policies continued, more mission schools were established, and a government supported school for part-Aboriginal and Aboriginal children was established in Darwin in 1913 (Giese, 1969).

There is some evidence that during the period up to the 1930s the relationship between the department responsible for Aboriginal policy and the Education Department of a state had influence on the attendance of indigenous children who lived in a white community at the local government school, the schooling of part-Aboriginal children, the provision of teachers and whether or not teachers in Aboriginal schools on government stations were qualified (Reynolds, 1972: 67-70). In some states, for example, New South Wales (New South Wales Education Department, 1969), South Australia (Gunton, 1969), and Western Australia (Watts, 1981: 13-15) full acceptance by the Education Department of responsibility for Aboriginal education did not occur until after 1950.

In 1937 a Conference of Aboriginal Authorities held in Canberra proposed that a national policy of assimilation, supported by uniform legislation, should be adopted for those indigenous people who were not of the 'full blood'. The proposed policy included recommendations that the state authorities should ensure that indigenous children of 'mixed blood' and those of the 'full-blood' who lived in white communities were educated at the same standard as white children. It also included a recommendation that the Commonwealth should provide financial assistance to the States for the carrying out of the proposed policy (Reynolds, 1972: 172-174).

Teachers

As far as teachers were concerned the majority were Crown employees, but this did not deter the growth of teacher unionism in the period up to 1950. In all jurisdictions except Victoria and Tasmania government sector teachers had access to conciliation and compulsory arbitration (Spaull, 1986, 1987, 1989). In the non-government sector there was also a growth of teacher unionism among some non-government sector teachers (Theobald, 1983). In Victoria the first step in state control of non-government schools was taken by the *Teachers and Schools Registration Act 1905*,^{li} a development which was followed later in most other jurisdictions. This period also saw the further growth of major teachers' colleges, and the first faculties of education in universities.

TAFE and vocational education

The momentum for the development of technical education during the period 1900-1910 was boosted by the training needs of the heavy industrial sector during the First World War. Although the management of some of the major technical colleges was at least quasi-autonomous, many technical colleges were established under the control of a state department responsible for technical education. These provided vocationally oriented diploma and certificate courses in a variety of fields, but particularly in the branches of engineering and commerce, and in domestic science for women (Rushbrook, 1995: 129-130; Dillon, 1984: vol 1, chs 1-6). Vocational education was chiefly carried out through the apprenticeship system. Government enterprises such as State railways and Commonwealth dockyards had well-established apprenticeship schemes, as did the larger industrial firms such as BHP. In many trades small and medium-sized employers participated in the training of apprentices. During this period, state authorities, like the Apprenticeship Commission established in Victoria in 1928, were created to control the conditions of apprenticeship (Rushbrook, 1995: 129-139).

Higher education

At the outbreak of World War II in 1939, the embryonic higher education sector had grown to the point where Australia maintained seven universities each established under its own statute. The universities had well established faculties in fields such as medicine, law, science, engineering, commerce, arts, music but not all universities had a faculty in every major field of study (Hyde, 1982).

Commonwealth-state Relations and Education to 1950

It is not possible within the scope of this paper to examine in detail Commonwealth-state relations during the first half of the twentieth century, but certain salient developments must be briefly noted. Firstly, the Commonwealth Constitution provides for a division of fiscal powers between the Commonwealth and the states, and the subsequent interpretation by the High Court of the constitutional provisions relating to the grants power (s96), taxation, and to the imposition of customs and excise duties has meant that the financial strength of the Commonwealth increased and that of the states declined (Hanks, 1980: 539-650; Coper, 1988: 187-225). Secondly, the federal arbitration and conciliation system, established in 1904, by the (Cth) *Conciliation and Arbitration Act 1904*^{lii} under s 51 (xxxv) of the Constitution which gave the federal government the power of ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’, grew in importance and influence, although teacher industrial relations matters remained within the province of the states.

Thirdly, at federation, because education was a power which remained with the states, there was only relatively minor Commonwealth involvement in education matters relating to

defence, the health of children and education in the territories during the period up to 1939 (Birch, 1975: 84-85). This situation changed with the outbreak of World War II. The Commonwealth Minister for Labour and National Service, E J Ward, in 1942 established a Universities Commission and introduced controls on university enrolments. Although the High Court in *R v University of Sydney; Ex parte Drummond* (1943) 67 CLR 95; 17 ALJ 103; [1943] ALR 227 held by a majority that the relevant regulations were invalid because the Commonwealth had no power to make laws about education and was not able to do this under the defence power, this did not stop the growth of Commonwealth influence in the provision of technical education and university education. The regulation was re-written without reference to education and John Dedman introduced new procedures (Birch, 1975: 69-76; Spaul, 1992a, Tannock & Birch, 1973).

Fourthly, concern for the kind of post-war society Australia would be led the Curtin government as early as 1942 to bring before the Parliament a bill, the *Constitution Alteration (War Aims and Reconstruction)* Bill under which matters such as health, child welfare and vocational training would become the responsibility of the Commonwealth. In 1943 scholarships were introduced for students in certain university faculties and engineering students at technical schools. However, the pharmaceutical benefits scheme for which the Commonwealth appropriated money under s 81 of the Constitution was held to be invalid by the High Court in *A-G (Vic); Ex rel Dale v The Commonwealth* (1945) 7 CLR 237, and this decision cast doubt on the validity of the social welfare legislation and the *Education Act 1945* (CTH)^{liii} in which the scholarship scheme had been included, despite the failure of the 1944 referendum to give the Commonwealth additional powers relating to social welfare measures. Another referendum, held concurrently with the election in 1946 which saw the Chifley government returned was passed and the social services amendment, s 51(pl xxiiiA) (Birch, 1975: 30-33). Section 51 (xxiiiA) authorised the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances. That the Commonwealth was empowered to provide 'benefits to students' meant that by the mid-twentieth century the political stage had been effectively set for the Commonwealth to play a greater role in education. Finally, it is worth noting that there was increased concern about Aboriginal education. After Commonwealth and state conferences in 1948 and 1949 policies relating to Aboriginal education were developed which would lead to changes in the 1950s and 1960s (Giese, 1969).

Litigation From 1910-1950

Parents and pupils

It cannot be said, on the basis of the reported decisions, that there was any increase in litigation in education during this period. There is, for example, no reported case where negligence arising from the teacher's and school's duty of physical care of children was alleged. Only one case concerning corporal punishment seems to have reached the superior courts, namely *Byrne v*

Hebden; Ex parte Hebden [1913] QSR 233; (1913) QJPR 112. It concerned the reasonableness of corporal punishment. The Queensland Magistrates Cases also record the matters of *Craig v Frost* (1936) 30 QJP 140 and *King v Nichols* (1939) 33 QJP 171. In the first matter the teacher's authority to administer reasonable corporal punishment was upheld, and in the second matter the corporal punishment of a female pupil was held to be reasonable within s 280 of the *Criminal Code (Qld)*, and a breach of education department regulations which prohibited the use of corporal punishment on girls was not a crime.

Teachers

From time to time matters arose concerning the employment conditions of teachers. In *Holmes v The King* (1922) 18 Tas LR 41 the Crown's power of dismissal was upheld. Apparent conflict between provisions relating to the payment of increments to teachers and those relating to official salary reductions during the 1930s depression years was an issue in *Burke v A-G* (1934) 29 Tas LR 77. Superannuation matters occasionally occurred: for example in *Cheek v State Teachers' Superannuation Fund Board* (1912) 8 Tas LR 63 a teacher who retired because of incapacity failed in his application for a temporary annuity. In *Ex parte McRae* (1940) 58 WN (NSW) 26 the principal of the Sydney Teachers' Training College, a part-time appointment, was also appointed Professor of Education at the University of Sydney. It was held that as an employee of the university, and as a part-time principal, he was not entitled to contribute to the state superannuation fund. In *the Trusts of Brisbane Grammar School* (1942) QWN 21 the Queensland Supreme Court was asked to consider the power of trustees to provide additional payment to teachers who had enlisted or been called up, and it was held that the trustees could do this.

The High Court's interpretation of s 51(xxxv), the conciliation and arbitration power, has over time been influenced by the weight given to the doctrine of intergovernmental immunities. The early High Court in a number of decisions had held that the states had an implied immunity from Commonwealth law and that the reverse was also the case, but moved from this in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 29 CLR 129 - the *Engineers' Case* - in which it held that the states were subject to Commonwealth legislation under s 51(xxxv) if the legislation covered them. This doctrine was not applied in the *State School Teachers' Case* 1929. Given the growth of teacher unionism, it was not surprising that in 1929 two of the branches of the Federated State School Teachers' Association of Australia, which was a federally registered union, the Victorian Teachers' Union and the Tasmanian Teachers' Federation served a log of claims upon their employers. In neither state did they have access to conciliation and arbitration, and when their employers would not respond, they sought access to a federal industrial award. The matter was referred to the High Court. In *Federated State School Teachers Association of Australia v R (Victoria)* (1929) 41 CLR 569 the High Court held that education was not an industry and teaching was not an industrial occupation and therefore could not generate an 'industrial dispute' within the terms of s 51 (xxxv) of the Constitution. (Birch, 1975: 66; Spaul, 1987, 1995) This meant that teachers' industrial law would remain the province of the states for

many decades to come, and that many other state employees would be refused access to the federal industrial relations system (Spaull 1986, 1987, 1989, 1992b, 1994, 1995).

Other matters

During this period, there seems to have been only one matter concerning the status of non-government schools under the principal education legislation. In *Municipal Council of Sydney v Kelly* (1933) LGR 160 the issue was whether denominational and other schools which were approved under the *Public Instruction Act 1880* (NSW) were liable to pay rates. It was held that they were not schools established under that Act and that they were liable to pay rates.

Philanthropic endowments of educational institutions were another source of occasional litigation when the validity of the charitable gift for the advancement of education was challenged. In *Taylor v Taylor* (1910) 10 CLR 218; 16 ALR 129 a gift for scientific research and for endowing an existing scientific institution was held by the High Court to be valid. A bequest to the University of Adelaide for the support of study in natural history was held by the South Australian Supreme Court to be valid in *Re Benham* (1939) SASR 450.

The first half of the twentieth century did not prove to be a time of great change in the legislative context of Australian education. Nor did it prove to be a period of a growth of litigation in education. Again, it must be pointed out that further research into archival sources might alter this viewpoint, and that this may simply reflect the general level of litigation in the community at large. However, by 1950 the scene was set for change in the legal context of Australian education.

Contemporary Developments in the Legal Context of Education

A major feature of contemporary developments in Australian education since 1950 has been the increasing involvement by the Commonwealth in the financing of all sectors of education - school education, TAFE and vocational education and higher education - and its increasing influence in the development and implementation of educational policies. From the making of specific capital grants to the states for the provision in both government and non-government schools of science laboratories in 1964 and of secondary school libraries in 1968 to the current *States Grants (Primary and Secondary Education Assistance) Act 1992* (CTH)^{liv} there has been increased federal funding for both capital and recurrent expenditure on school education. When the constitutional validity of federal government aid to non-government schools was challenged, the High Court held in *A-G (Vic) (Ex rel Black) v The Commonwealth* (1981) 146 CLR 559; 55 ALJR 155; 33 ALR 321 that the legislation which enabled financial aid to be given to denominational schools for their educational activities was not a law which assisted the establishment of any religion and consequently did not infringe s 116 of the Constitution. Federal funding of universities and TAFE and vocational education does not seem to have led to litigation to date,

although there have been some, albeit fewer than ten reported matters dealing with the interpretation of the *Student and Youth Assistance Act 1973* (CTH)^{lv} and the regulations made under it for the disbursement of allowances to students.

There have been major changes in the Commonwealth policies affecting the indigenous people. The detail of these lies outside the scope of this paper, but it must be noted that there has been a retreat from the assimilationist policy in Aboriginal affairs since the mid-1960s (Reynolds, 1972, 175). The 1967 referendum changed the Constitution to include Aboriginal people in the census and to recognise them as Australian citizens, and to give the Commonwealth government power to legislate for Aboriginals in the States (Ellis & Ellis, 1992: 138). Finally, the passing of the *Racial Discrimination Act 1975* (CTH), and of the *Native Title Act 1993* (CTH),^{lvi} after the High Court decision in *Mabo v The Commonwealth* (1992) 66 ALJR 408 may also be noted.

Commonwealth involvement in Aboriginal affairs and in education generally has increased since 1950 (Watts, 1981: 25-30). In 1950 the Commonwealth Office of Education became responsible for Aboriginal education in the Northern Territory, a responsibility returned to the Welfare Branch of the Northern Territory Administration in 1956. Since the 1950s there have been many developments in schools, teacher training and curriculum in the Northern Territory (Giese, 1969; Watts, 1981: 9-13). From 1973 there has been cooperation between federal and Northern Territory authorities in the provision of education for Aboriginal children (Watts, 1981: 25-29). There has been additional Commonwealth expenditure on Aboriginal and Torres Strait Islander education throughout Australia generally (Watts, 1981: 42-57). Benefits to students are provided under the Abstudy scheme provided for in the *Student and Youth Assistance Act 1973* (CTH). The National Aboriginal Education Committee was established in 1977 (Watts, 1981: 66-69), and in the school education sector there have been a variety of developments initiated by the Aboriginal community during recent years: education hostels, the training of teaching assistants and teachers, bilingual education programs and the establishment of independent Aboriginal schools (Ellis & Ellis, 1992: 138-140; Watts, 1981: 64-73). The promotion of research, training and the development of a cultural resource collection in Aboriginal and Torres Strait Islander studies, commenced by the Australian Institute of Aboriginal Studies, established under the now repealed *Australian Institute of Aboriginal Studies Act 1964* (CTH),^{lvii} has been continued by the Australian Institute of Aboriginal and Torres Strait Islander Studies established under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (CTH).^{lviii}

Some Contemporary Developments in Litigation

Parents and pupils

There has been a small number of reported cases involving pupil discipline. In government schools two cases dealt with corporal punishment. Such issues are receding with the moves within the past decade in several jurisdictions to abolish the use of corporal punishment. One case dealt with the expulsion of students. In non-government schools issues relating to the expulsion of

students have been raised. In *McLean v Moore* (1969) 90 WN (Pt1) (NSW) 679 it was held that pupil record cards, which the plaintiff, injured in a cycling accident, wished to produce in a negligence action, were not privileged and could be used.

Most of the reported matters which have involved individual pupils have been actions for breach of the duty of physical care of pupils, and most of these have arisen since the 1960s. There have been at least eighteen of these matters reported since the decision of the High Court in *Ramsay v Larsen* (1964) 111 CLR 16, which overruled *Hole v Williams* (1910) SR (NSW) 638, and held that the Crown was liable for the negligence of teachers. In this case and in *Geyer v Downs* (1977) 138 CLR 91, and in *The Commonwealth v Introvigne* (1982) 150 CLR 258 the High Court has also moved away from the definition of the standard of care of teachers given by Lord Esher in *Williams v Eady* (1893) 10 TLR 41. The traditional definition equated the standard of care required of teachers with that of the prudent parent, but in various comments the High Court has suggested that a higher standard of care is required of teachers.

It is difficult to say whether there has been an increase in the litigation relating to teachers' alleged professional negligence. This requires further research and consideration of matters such as the number of claims and settlements, the quantum of damages and professional indemnity insurance issues. During this period, there has been some expansion of the categories of the tort of negligence generally, and the litigation relating to education may merely be a reflection of the broader movement. Further, this period has seen the growth of mass secondary education and a great increase in the numbers of schools, teachers and pupils. Perhaps, the apparent increase in negligence actions was merely what might have been expected in view of this fact. To date there is no reported decision in Australia dealing with educational malpractice, although this issue has attracted some commentary. Whether this will continue in the future remains to be seen (Hopkins, 1995).

There has been one case relating to compulsory education: *Cunningham v Cannon* [1983] VR 641, and one dealing with what constitutes 'secular instruction': *Benjamin v Downs* [1976] 2 NSWLR 199. Two reported matters relate to parents' unsuccessful challenges to ministerial powers in relation to selection of government schools: *Ex parte Cornford; Re Minister for Education; Ex parte Wilkes; Re Minister for Education* (1961) NSWLR 98; [1962] SR (NSW) 220 and *Pannifex v Minister of Education* [1976] 1 NSWLR 449. One reported matter deals with an unsuccessful parental challenge under the education legislation to ministerial powers to close schools: *Durant v Greiner* (1990) 21 NSWLR 119.

Teachers

There has been a trickle of litigation arising from the public sector employment of teachers. Issues such as teacher training agreements, superannuation, the calculation of long service leave benefits, promotion, and dismissal have from time to time been the subject of litigation, but inspection of the summaries of reports in the *Australian Digest* suggests that there have been fewer than thirty such cases heard by the superior courts since 1955. There has been a steady growth of collective

litigation in the industrial law field in relation to teachers, in both the government and non-government sectors. After the High Court decision in *Re Coldham; Ex parte Australian Social Welfare Union; Reg v Ex parte Australian Workers Union* (1983) 153 CLR 297 (the *Social Welfare Case*) the issue of a federal award for teachers, as well as for academics in higher education re-emerged (Spaull, 1995).

Schools

There have also been some cases arising from the interpretation of education legislation. In three matters, *Ex parte Jasaitis* (1970) 91 WN (NSW) 444; [1970] 2 NSW 521, *Cromer Golf Club Ltd v Downs and Registrar-General* [1972-73] ALR 1295, *Noontil v Auty* [1992] 1 VR 365, and *Universitas College Pty Ltd* (1992) 26 NSWLR 554 the superior courts considered the legal definition of a school.

Issues relating to the registration of government schools have arisen in five reported cases in the Northern Territory, New South Wales and South Australia, during the 1980s and early 1990s. These included *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376; 54 ALR 571 in which the Full Court of the South Australian Supreme Court held that there was no inalienable right to religious freedom to support a successful appeal against a conviction for the offence of conducting an unregistered school.

Higher education

Before the 1970s and 1980s there was very little litigation which involved universities' administrations, although *Orr v University of Tasmania* (1957) 100 CLR 526 should be noted. In that case the High Court upheld the University's power under contract and under the university statutes to dismiss a professor where misconduct was considered to have occurred. During the 1970s and 1980s there has been some more litigation in the superior courts. There were four reported matters relating to student affairs during the late 1970s, and two relating to the interpretation of award provisions relating to misconduct by academics. In at least ten matters reported during the 1980s and early 1990s the exercise of the visitorial jurisdiction was invoked in disputes between universities and their staff and students. However, the future of the visitorial jurisdiction in some states seems limited. Some university statutes^{lix} have not included provision for this jurisdiction and more recently in New South Wales under the *University Legislation (Amendment) Act 1994*⁶⁰ the Governor is to be visitor for New South Wales' universities, but has ceremonial functions only.

Statutory rights referable to education

An important feature of the development of the legal context of education since the 1970s has been the passing of legislation which confers on individual persons statutorily enforceable rights referable to the provision of education and to employment in education. Such a change is likely to

produce litigation. The anti-discrimination legislation passed by the Commonwealth and the States and Territories provides the best example of this. A survey of the nearly 800 equal opportunity cases reported, either in the reports of the superior courts or reported, digested or noted in the CCH service *Australian and New Zealand Equal Opportunity Law and Practice*, indicates that there have been well over sixty cases in which education authorities, schools, TAFE colleges and universities have been alleged to have discriminated against students in the provision of educational services or staff members in matters such as appointments, promotions and dismissal. Direct and indirect discrimination has been alleged on several grounds including sex, marital status, race, impairment, disability, sexuality, age and mandatory retirement. The anti-discrimination legislation does seem to have led to a new source of litigation in Australian education.

However, it is important to remember that all this legislation provides for extensive conciliation machinery, through which most of the complaints are resolved, and which may be freely accessed. Inspection of the annual reports of the Equal Opportunity Commissioners suggests that although a significant number of enquiries may be received, some are outside jurisdiction, many are not proceeded with, and of the remainder, most are resolved by conciliation. Only a relatively small number become contested matters (See for example, NSW Anti-Discrimination Board, *Report 1990/1991*, *Report 1994/1995*; Victoria, Equal Opportunity Commission, *Report for 1990-1991*, *Report for 1994-1995*). Inspection of these *Reports* shows that complaints of discrimination in the area of education are made, but further research is needed to ascertain the significance of the number of complaints, and of those which become litigated matters.

The Freedom of Information legislation, which has been operational in the Commonwealth and Victoria since 1982, and more recently in several other jurisdictions has also been a new source of litigation in education. Dedicated to the fostering of open government, the FOI legislation provides for low cost access by individuals to the records of prescribed agencies. Access is to be given to documents - generally very broadly defined - which do not fall within the statute's provisions relating to exempt documents, and there are usually provisions enabling an individual to apply to have personal records amended if they are incorrect. Litigation tends to arise when the agency claims that the documents are exempt from disclosure, or that the personal records of an individual are correct and that the amendment sought is unnecessary. For example, an estimate of matters reported in the *Victorian Administrative Reports* indicates that there have been since 1986 in Victoria at least seven reported matters relating to teachers and schools, and an estimate of matters reported in the *Australian Administrative Reports* and *Administrative Law Decisions* since 1984 reveals at least nine reported matters which have involved the Australian National University, Canberra University and universities in Victoria. It is possible to suggest that the introduction of Freedom of Information legislation in other jurisdictions will lead to a modest growth in litigation in education.

Finally, the growth of Ombudsman legislation may be noted. This again provides for free access for complainants, but the matters are investigated by the relevant ombudsman and

adversarial litigation does not generally ensue. Ombudsman legislation had been passed in all Australian states by 1978 and the Ombudsmen's reports indicate that complaints are received from all sectors of education (Jacobson, 1994).

Conclusion

This brief historical exploration of the legal context of Australian education in the nineteenth and twentieth centuries has sought to describe the legal and constitutional contexts in which state education systems were developed in the nineteenth century and the changes which have occurred in those contexts since federation. In the period up to 1945, on the basis of the reported decisions of the superior courts, there seems to have been relatively little litigation in Australian education, but this may simply reflect the general level of litigation in the community. A brief analysis of the reported decisions reveals that most involved interpretation of education and/or public service legislation. The major exception was the *State School Teachers' Case 1929* which reflected the growth of teacher unionism and which concerned the constitutional scope of the federal industrial law jurisdiction.

In the period since 1945 the legal context of the provision of education in the states and territories has included constitutional issues and issues relevant to judicial review of administrative actions as the Commonwealth has become more involved in the financing of education and in the development of educational policy across all sectors of education and for indigenous education. The legal context of the provision of education has also become more complex with the introduction of statutorily enforceable rights referable to education. Save for the negligence cases, and the industrial law jurisdiction, most of the cases have concerned the interpretation of legislation which affects the organisation and delivery of educational services. However, it is not possible to say whether or not this is an increase greater than the increase in litigious activity in the community generally. It may merely reflect population growth and the increase in the number of participants in education as mass secondary education and mass tertiary education have been introduced. What can be said is that where the legislative context of the provision of educational services and of employment in education has changed to provide statutorily enforceable rights, then despite the existence of alternative dispute resolution procedures, some growth of litigation involving educational authorities and institutions has occurred as individuals have sought to enforce those rights in tribunals and courts. This is most clearly evident in anti-discrimination law, particularly given the mechanisms for dispute resolution by conciliation in this field, but again it is not possible to say, without further detailed research, that the increase in adversarial disputes about discrimination in education is greater than in other areas of activity in which discrimination is also prescribed.

Finally the influence of the adversarial legal system itself does need to be taken into account. Firstly, many more writs are issued, that is actions are started, in the superior courts, than come to verdict. Many matters are settled (Pose & Smith, Maher, Waller and Derham, 4th ed,

1984: 18-19). In one sense, therefore, the cases which come before the courts are the tip of the iceberg of actions which are commenced. Secondly, exercising a right of access to the courts in Australia has generally traditionally been, and remains, a lengthy and fairly expensive procedure, and in the absence of sufficient financial resources to sustain an action, this has tended to lessen the individual's willingness to start and continue an action. Thirdly, the reports of the anti-discrimination boards and of the Ombudsmen's offices, for example, of the complaints they receive about the provision of educational services show that individuals are more willing to complain where access is free and the complaint can be dealt with expeditiously, either by means of conciliation or by administrative action. Consequently, it would probably be unwise to conclude that the historically and contemporaneously low volume of litigation in education in Australia has necessarily been a vote of confidence in the organisation and delivery of educational services. Whether there will be an increase in litigation involving educational authorities and educational institutions in the future remains to be seen.

Keywords

Australian Education	History
Legal Context	Litigation

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* The extract from *Fleming v Greene* (1907) VLR 394 is reproduced by the consent of the Victorian Council of Law Reporting.

Endnotes

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- i. 63 & 64 Vict c 12.
 - ii. 5 & 6 Vict c 76.
 - iii. 13 & 14 Vict c 59.
 - iv. 18 & 19 Vict c 54.
 - v. 17 Vict No 41.
 - vi. 18 & 19 Vict c 55.
 - vii. This act was not numbered.
 - viii. 18 Vict No 17.
 - ix. 19 & 20 Vict No 2.
 - x. 18 & 19 Vict c 54.
 - xi. 52 Vict No 23.
 - xii. 53 & 54 Vict c 26.
 - xiii. 5 & 6 Vict c 36.
 - xiv. 4 Geo IV c 96.
 - xv. 9 Geo IV c 83.
 - xvi. 5 & 6 Vict c 76.
 - xvii. 10 Geo IV c 22.

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- xviii. 4 & 5 Will IV c 95.
xix. 7 Will IV No 5.
xx. 13 & 14 Vict c 59.
xxi. 14 Vic No 49.
xxii. 15 Vic No 10.
xxiii. 24 Vic No 6.
xxiv. No 149 of 1862.
- xxv. 30 Vic No 22.
xxvi. 32 Vic No 14.
xxvii. 36 Vic No 14.
xxviii. 36 Vic No 447.
xxix. No Vic No 11.
xxx. No 11 of 1875.
xxxi. 39 Vic No 11.
xxxii. 43 Vic No 11.
xxxiii. 58 Vic No 30.
xxxiv. See for example: *Education Act 1872* (VIC) s 13, and Schedule to the Act; *Public Schools Amendment Act 1873* (TAS) ss 2, 3, and 5; *State Education Act 1875* (QLD) ss 28, 30 (which were not actually implemented until 1900); *Public Instruction Act 1880* (NSW) ss 20 and 35; and *Elementary Education Act 1873* (WA) s 15 expressly provided for an exemption for instruction at home and for attendance at a private school.
xxxv. See for example: *Public Instruction Act 1880* (NSW) ss 17, 18; *State Education Acts, Amendment Act 1910* (QLD) s 22.
xxxvi. See for example: *Education Act 1872* (VIC) s 12.
xxxvii. See for example: *State Education Act 1875* (QLD) s 13; *Public Instruction Act 1880* (NSW) s 28.
xxxviii. See for example: *Victorian Parliamentary Debates* 1910, vols 124 and 125, *passim*, for the debates on the Victorian Education Bill 1910, and the marginal notes to the *Education Act 1915* (SA), (No 1223 of 1915) which clearly indicate the imperial genesis of many of the provisions of that Act.
xxxix. 14 Vic No 31.
xl. 16 Vic No 34.
xli. No 20 of 1874.
xlii. 53 Vic No 9.
xliii. 63 Vic No 9.
xliv. No 160 of 1862.
xlv. 45 Vict No 710.
xlvi. 47 Vict No 773.
xlvii. Some Victorian superannuation cases took years to resolve, and M.Ed. research being undertaken by Ms Cheryl Griffin at the School of Graduate Studies, Faculty of Education, Monash University, Clayton, ‘The Twilight Complaint - a group of teachers in a 50 year pursuit of the pension claim’ indicates clearly that there were many teachers and other

public servants affected by the legislative changes. There are other reported cases where the plaintiffs were public servants in departments other than education.

- xlvi. 6 Geo V 2713.
- xlvii. 57 Vict No 1334.
- xlviii. 61 Vic No 17.
- xlix. 5 Edw VII, No 2013.
- l. No 13 of 1904.
- li. No 55 of 1945.

- lii. No 160 of 1992, as amended.
- liii. No 155 of 1973, as amended.
- liiii. No 110 of 1993.
- lv. No 56 of 1964.
- lvi. No 149 of 1989.
- lvii. See for example: *Australian National University Act 1991 (CTH)* (No 131 of 1991), *Northern Territory University Act 1988 (NT)* (No 49 of 1988), *University of Queensland Act 1965 (QLD)* (No 52 of 1965), *James Cook University of North Queensland Act 1970 (QLD)* (No 19 of 1970), *Griffith University Act 1971 (QLD)* (No 38 of 1971), *Queensland University of Technology Act 1988 (QLD)* (No 97 of 1988) and *Edith Cowan University Act 1990 (WA)* (No 63 of 1990).