

# THE ORIGINS AND DEVELOPMENT OF EDUCATION LAW AS A SEPARATE FIELD OF LAW IN THE UNITED STATES AND AUSTRALIA

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*Considerable education legislation is passed in both the United States of America and Australia, and other nations, to govern educational activities at state and federal levels. In the US, educational challenges proliferate in the courts and students and parents seek for appropriate educational provision or compensation. In Australia, while actions are not common, a considerable case law on a range of matters is in existence, and is growing. This article examines these contexts to argue that education law should be recognised as a legal field, and that judicial determinations should recognise parameters of education law in decision-making.*

## I INTRODUCTION

The purpose of this article is to discuss and rationalise the development of a separate legal field called ‘education law’ in the United States of America (United States) and Australia, a country that shares the English common law tradition with the United States. This article will focus on the dynamics in both countries that have encouraged the development of a separate field of education law.

Determining whether a new field of law has, or should, develop depends to a large extent on what one considers, in the first place, to be a field of law. The speciality courses available in law schools today as compared to forty years ago when the lead author graduated clearly mirror the increasing complexity of the practice of law. While the purpose of this article is not to determine whether any or all of these speciality courses represent new fields of law, the article does propose that education law qualifies, under the criteria discussed, as a new field in both the United States and Australia.

### *A Background for the Development of Education Law in the United States*

Whether a collection of judicial decisions, legislative statutes or administrative regulations with a common theme warrants the creation of a new field of law depends on several factors. The field of education law in the United States owes much of its development to legal concepts (borrowed from existing fields of law, such as contracts, torts, constitutional, and property) that

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have been reconstituted and applied to the operation of schools. The emergence of education law as a distinctive field in the United States reflects in large part the nature of the educational process that requires students in all 50 states to attend schools pursuant to state compulsory attendance requirements.<sup>1</sup> The development of constitutional and statutory rights over the past half-century has found a ready source of litigants among the 14,500 school districts in the fifty states providing education through 92,000 elementary and secondary schools to 46.5 million students.<sup>2</sup>

As a reflection of education law as a well-established separate field of law in the United States, many law schools offer a course on education law and the course is a requirement in all school administrator preparation programs in the fifty states. So well-developed has become the area of education law that some law schools and most graduate schools now also offer separate specialty education law courses in special education law and sports law. Many law firms employ a considerable number of attorneys and dedicate a substantial amount of resources to purchase resources devoted to the explication and analysis of education law, solely for the purpose either of representing school districts and school district employees or parties such as parents and students making claims against schools. As reflected by the 2000-3000 reported state and federal cases involving education each year, litigating legal issues concerning education has become a major industry in the United States. Such a number though does not reflect the unknown number of lawsuits threatened but never filed or lawsuits filed but resolved prior to trial, all of which consume the time of school personnel and the resources of educational institutions.

Although education law in the United States has been glamorised as the development of rights, especially the rights of students, the field of education law more properly involves the ongoing definition of the responsibilities of, and limitations upon, the states and the school boards in managing school districts.<sup>3</sup> Under the Tenth Amendment of the U.S. Constitution, control over education is an implied power residing with state legislatures.<sup>4</sup> This focus of authority at the state level has meant that administrative units within each state, referred to as school districts — each of which is managed by an elected school board — are responsible for implementing education goals and directives set forth at the state level through statutes and regulations.

### *B Background for the Development of Education Law in Australia*

The major difference one must keep in mind when comparing the state of a field of law in the United States and Australia is that while both countries have a written Constitution, Australia's federal constitution has no Bill of Rights or Amendments. Australians hence have in principal no individual rights, apart from free exercise of religion,<sup>5</sup> the right to a trial by jury for any allegation of a criminal offence,<sup>6</sup> and a fuzzy right to political free speech in certain contexts.<sup>7</sup> However, notwithstanding the absence of individual rights, Australia has a system of law similar to those of England and the United States, with fields such as contract, tort and property, and a strong system of both common law and precedent, and statutory law. While individual rights are not a source of due process claims in Australia, many statutes bestow common rights such as in the fields of discrimination and disability law. Courts and tribunals also ensure that due process, established through the principles of natural justice in Australia by statute or common law,<sup>8</sup> is followed for the individual.

The difference between the development of education law between the two countries largely reflects the scale of size. With only approximately 7000 public schools under state or territory control,<sup>9</sup> the history of education law cases in Australia has not reached, and never will reach, the volume of the United States. However, the exercise of challenges within the above legal framework, and the existence of strong industrial organisations amongst teachers, combined with

a growing litigious stance by the population ensure a steady, and increasing, flow of education legal challenges. In the United States, in part due to the individual rights asserted through the Bill of Rights, students and parents exert their perceived right to seek legal address to their individual concerns. The United States' courts give due consideration as to whether a cause of action can be found, and thus discussion of a range of claims, even those that do not succeed, occurs in the court reports. In Australia, the anecdotal evidence is that while many students and their parents also try to seek legal redress, few reach the courts. This occurs for two reasons, even when a cause of action may be found. First, there is a strong, and growing, tradition of mediation and dispute resolution in Australia that may even be ordered by the courts.<sup>10</sup> Second, governments and schools choose to settle claims out of court to avoid adverse publicity, the costs involved in a legal challenge (given settlements are believed to be fairly small), or a 'floodgate' of similar claims.<sup>11</sup> Private schools, where education of children may be challenged under contract law and *Trade Practices Act*,<sup>12</sup> and which educate a high proportion of Australian children,<sup>13</sup> reportedly settle many challenges out of court. However, while the known history and volume of legal challenges in Australia may not be large, the diversity of claims and the educational context are not dissimilar to those of the United States and provide a framework for considering the field of education law.

## II RATIONALE FOR EDUCATION LAW IN THE UNITED STATES

Determining whether a new field of law needs to be recognised depends on the convergence of at least four factors: (a) a critical mass of existing legal material that has a common core; (b) a reasonable prospect that the rate of production of material in this common core is sustainable; (c) a recognition that failure to place the common core within its separate field could result in the conveying of fragmented, disjointed, and/or inaccurate information; and (d) 'consumer' interest in, and demand for, a unified and separate source of information about the field.

Determining whether a critical mass of education law legal material exists is mainly quantitative in nature, which essentially means the numbers of judicial decisions, legislative statutes, and/or interpretative regulations. Any effort, however, to assigning a specific number to these judicial, legislative and administrative materials for the purpose of determining criticality, misses the key point that a new field of law must satisfy all four factors.<sup>14</sup>

A critical mass depends on more than an isolated case, statute or regulation, even in such situations as when a law decision emanates from the nation's highest court. A decision from the Supreme Court will thus not, in itself, be dispositive of the need for a new field of law unless that decision has generated new litigation, legislation or regulations. Discussed below are two Supreme Court decisions, *Bob Jones University v United States (Bob Jones University)*<sup>15</sup> and *Brown v Board of Education of Topeka (Brown)*,<sup>16</sup> the first of which would not have supported the creation of a new field of education law while the second one, viewed in retrospect, did become the starting point for education law in the United States.

In *Bob Jones University* the Supreme Court upheld an Internal Revenue Service (IRS) regulation<sup>17</sup> revoking the tax exempt status of a private, religious university with racially discriminatory religion-based marriage and dating policies. Revocation of tax exemption status would have a serious, perhaps even fatal, impact on any university in the United States because donors to the university would no longer be able to deduct their contributions against their personal income tax liability. The Supreme Court, in *Bob Jones University*, was faced with a conflict between an IRS regulation removing government-conferred tax exemption, and

thus what could have been perceived as tacit government approval of the private university's racially discriminatory practice, and the university's marriage and dating policy<sup>18</sup> grounded in sincerely held religious beliefs. In upholding the IRS regulation, the Court created for the first time a new legal concept, 'fundamental public policy',<sup>19</sup> that could be invoked in a case like *Bob Jones University* to eradicate discrimination.<sup>20</sup> The notion that this new concept could subordinate previously protected constitutional beliefs to government social policy represented an extraordinary new exercise of judicial power. The *Bob Jones University* case had the potential to open the door to government eradication of all kinds of discrimination at all levels of private education. However, other than generating considerable discussion among legal scholars,<sup>21</sup> the Supreme Court's decision passed quietly into the night, having no further significant impact on the development of substantive law. In the end, despite the initial potential for the generation of new judicial, legislative and administrative law, *Bob Jones University* serves as an example of a law case that, even though emanating from the highest court, failed to reach that potential.

Even though *Bob Jones University* is rather an anomaly in the sense that it is one of the rare education-related Supreme Court decisions that has not created its own critical mass of legal materials, the Court's decision nonetheless is a case study reflecting that criticality will depend on more than the source of a decision.<sup>22</sup> In contrast to *Bob Jones University*, the prominent case of *Brown v Board of Education of Topeka* has spawned a vast galaxy of judicial and legislative progeny.

#### *A Development of a Critical Mass: Lessons from Brown v Board of Education*

New fields of law tend to develop incrementally as judicial opinions and legislative enactments gradually form a critical mass of law defining a specific field. In the United States, the Supreme Court's decision in *Brown* accelerated this process. Five areas of change regarding education law have developed in the fifty years since *Brown*:

*First*, *Brown* represented the first in what was to become a flood of federal court interventions into the operation of school districts that up to that point in time had largely been the responsibility of states under the Tenth Amendment. *Brown* and its progeny of desegregation cases represented the most expansive and intensive exercise of equity power<sup>23</sup> in the history of the federal courts that in many cases actually supplanted the authority of school boards and state legislatures to operate public schools.<sup>24</sup> Although the direct impact of *Brown* can still be seen in the number of school districts still under federal oversight, the past fifty years have also witnessed an explosion of litigation involving student and employee constitutional rights that have impacted the operation of schools. *Brown* has inserted federal courts into educational decision-making that goes far beyond the isolated pre-*Brown* cases where federal courts limited their intrusions into state and school board operation of schools into balancing the rights of parents to make educational decisions with the rights of states and school boards to control education.

*Second*, *Brown* precipitated a series of federal and state anti-discrimination laws that swept within their protection a wide range of areas that went far beyond the original concern about race.<sup>25</sup> In its movement toward what some would refer to as the federalising of American education, Congress has used the power of the purse to tie the obligation to protect equal educational opportunities to the reception of federal funds.<sup>26</sup> Judicial enforcement of these laws has subjected school teachers, administrators and board members to new concerns about interpretations of state and federal laws, mandates for meaningful and effective compliance under those laws, exposure to compensatory liability, and the vagaries of governmental immunity. The past half-century of American history since *Brown* has demonstrated that a critical mass of education law materials

goes far beyond case law to include legislative statutes and their interpretive administrative regulations.

*Third, Brown* was the direct and immediate cause for formation in 1954 of the Education Law Association (ELA)<sup>27</sup> in Topeka, Kansas, the city and school district that had been the subject of the *Brown* litigation. In the intervening 50 years, ELA, with its large membership of lawyers, higher education professors of education law, and school practitioners, has become a major producer of publications covering virtually every issue facing schools. ELA was not alone and other membership education organisations and advocacy groups began generating newsletters, journals, monographs, and books to inform education practitioners of relevant new court decisions and statutes that impacted their schools. The result has been an incredible proliferation of materials providing advice, suggestions, guidelines and recommendations for the effective and legal operation of schools, some of which, inevitably, will be conflicting.

*Fourth, Brown* precipitated the creation of education law courses in school administrator programs that by the mid-1970s would become a requirement for licensure in every state. With the required education law courses came a new kind of textbook, one that not only contained discussions about the law, but included edited copies of judicial decisions.<sup>28</sup> School administrators were now not only subjected to commentary about the law, but were expected to be able to read and understand how courts explicated and interpreted the law.

*Fifth*, an education constituency more knowledgeable about the law of education demanded attorneys who not only could apply existing fields of law to education but who could keep them abreast of the rapidly expanding numbers of state and federal court decisions, statutes and regulations. The demand for attorneys knowledgeable in education law reflected not only the need for clear and accurate statements about the law but also the need for attorneys who understood how that law would apply to the operation of schools. Increased litigation involving schools and school employees prompted educator professional organisations to offer liability insurance to their members and resulted in these organisations employing in-house attorneys and in school boards engaging attorneys on retainer arrangements.<sup>29</sup>

### *B The Need for a New Field of Law: The Importance of Consumer Demand*

While all of the changes discussed above cannot be attributed solely to *Brown*, they do reflect the multiple forces set in motion when courts and legislatures act to effect changes in schools. More importantly though, they indicate that creation of a new field of education law involves more than just looking upon case law and statutory enactments as inputs. These cases and statutes contain principles and requirements that must be translated into outputs that can be applied in the operation of schools.

These outputs presuppose at least two kinds of consumers, one set of consumers to assimilate the case and statutory law and distil from them principles and requirements, and a second set of consumers to operationalise those principles and requirements within schools. The first group of consumers normally would be identified as law-trained persons (attorneys) skilled in interpreting the standard areas of law (for example, contracts, torts, property) and extracting legal principles from new case law and statutes applicable to education, while the second group of consumers skilled in pedagogy must apply those principles to the management of schools. Although the functions of these two groups of consumers tend to suggest a sequential relationship, namely that educational practitioners look to lawyers for legal advice (principles and requirements), the

increased legal awareness in the United States by non-law trained education practitioners through course work and continuing education makes the relationship more of a tandem partnership.

In essence then, the strongest justification for a new field of education law occurs when those responsible for implementing the law generated through new judicial decisions, legislative enactments and regulatory policies (education practitioners) have ready access to materials explaining changes in the law. The claim is not that teachers and administrators will become attorneys, but that educational practitioners must have confidence in their ability on a daily basis to understand and interpret court decisions and statutes. The more sophisticated that education practitioners become in their understanding of the law, the greater the ease with which they can engage in conversations with attorneys and the higher will be their expectation that attorneys accurately translate the language of courts and legislatures into the language of educational implementation.<sup>30</sup>

In order to arrive at this level of mutual interaction between legal and education practitioners, a separate field of education law, if it does not currently exist, will have to be created. As a sustainable critical mass of education law judicial, legislative and regulatory materials increases, a separate field of education law is essential if advice to education practitioners is to be timely and accurate. In the United States, as the critical mass of education law material has increased exponentially, the role of the school attorney has included not only giving advice to educational practitioners regarding current problems, but also commenting upon or correcting advice available to education practitioners from a multiple number of published sources. These greater demands placed upon attorneys representing schools and school personnel have required a greater investment of their time in accessing and assimilating the law related to schools, which in turn has led to more attorneys devoting their entire practice to education law. The sheer mass of legal material, the vulnerability of schools and school personnel to liability, and the greater understanding by education practitioner consumers of legal matters have demanded a more knowledgeable and focused group of education lawyers. Education law attorneys must not only know the law but they must also know and understand the educational process to which that law is to be applied. In the end, the need for a separate field of education law in the United States has been fuelled by the spiralling increase in the critical mass of legal materials and the demand by both groups of consumers, attorneys and educators, for knowledge and understanding of the law and its impact on the education process.<sup>31</sup>

### III RATIONALE FOR EDUCATION LAW IN AUSTRALIA

While education law cases in Australia are limited, a healthy education law community exists. Following the trends in the United States, an Australia and New Zealand Education Law Association (ANZELA) has been in operation since 1991, there is an education law journal, and textbooks for teachers and administrators have been written. Law firms around the nation specialise or have specialist practitioners in education law, offering not only legal expertise but also online newsletters and training for the education sector about education law matters. Although volume is small but sustained, it can be argued that Australian law meets three of the factors identified as necessary for a new field of law — sufficient case material, although mainly in the areas of educational discrimination and negligence resulting in physical injury, expectation of the same or more volume of challenges in the future, and consumer demand. The question that must be addressed is whether there is that critical core of education case law that needs separate contextualisation to have informed both legal and educational practitioners.

Because of core differences in the way public education in Australia has always been controlled at a state, not municipal, level in terms of equality of funding from federal and state taxes, curriculum requirements and teacher qualifications and postings, a case as significant as *Brown* has not occurred to redirect basic educational provision and student rights. However, the plethora of legislation at the federal and state levels that govern school operations means that both system authorities and school staff need legal guidance — and regular updates — about their rights and responsibilities. Complex federal statutes such as the Disability Discrimination Act 1992 (Cth), when applied to educational institutions, have led to diverse judgments such as in the well-known Australian cases *Purvis v New South Wales (Department of Education and Training)* and *Scott and Bernadette Finney v The Hills Grammer (sic) School*<sup>32</sup> — schools have to tread a careful path in providing educational services for all students. While clearly smaller in number than in the United States, a collaborative and mutually-supportive community of lawyers and practitioners focused on the meaning and application of law in education has already come into existence.

In conjunction with this, however, two aspects of recent Australian case law arguably demonstrate that education law is becoming or needs to be considered a distinctive field in its own right. The first, as in the United States, relates to federal and state tensions in the control and delivery of education. The seminal case may be about to happen.

The past eight years have seen increasing federal incursion into the delivery of education by the Australian federal government using the power of the purse. Initially, the incursion was incremental, with new national goals being set by the Australian Government Minister for Education in conjunction with the Ministers of the states and territory.<sup>33</sup> The Ministers agreed with the policy directions being taken as they were party to the planning. However, the Australian Government has continued to increase its exercise of control over the states, for both private and public education, particularly through national accountability and testing regimes, initially of limited imposition with state reporting in literacy and numeracy by state testing of samples from Year 3 and 5 cohorts of students. This control has now extended to the current development of national statements of ‘essential learnings’ in a number of curriculum areas, and mandated national testing of all children on these. At the time of writing, the Australian Government was trying to direct two states in Australia to amend their high school matriculation schemes, despite one of current schemes in operation, the Queensland system, having had international acclaim as best practice for over twenty years. The battle lines are drawn in who has control of education in Australia, the federal government or the states and territories.<sup>34</sup>

The current standoff on this matter has come at the time when the Australian Government has flexed its muscle in a different arena, industrial relations, to establish new laws governing workplaces, employer behaviour and employee rights, but using the Constitutional corporations power.<sup>35</sup> The Australian Government introduced the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) on the premise of a clear appeal to the public good:

S 3 The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

- (a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market ...

Five states and a number of union organisations challenged the constitutional validity of the Act or parts of the Act in the High Court.<sup>36</sup> The High Court dismissed the challenge in a 5-2 (and 277 page) decision.<sup>37</sup>

Dissenting in the *Work Choices* case, Kirby J noted that if the Act was accepted under the current *Constitution*, states' concerns were realistic that the Australian Government could use the corporations power to affect many areas of operation that had previously been States' 'principal government activities' including 'education, where universities, tertiary colleges and a lately expanding cohort of private schools and colleges are already, or may easily become, incorporated'.<sup>38</sup> Justice Kirby described the Australian Government interpretation of s 51(xx) of the *Constitution* as 'opportunistic federalism'.

While s 107 of the *Australian Constitution* 'left' states in control of areas that they had when the Commonwealth came into being (1901) and that were not specifically vested in the Commonwealth in the *Constitution*, Australia has not had a 'reserve powers' interpretation of the *Constitution* since the seminal *Engineers* case.<sup>39</sup> *Work Choices* is strong and recent support for the extension of federal power into matters previously regarded as state responsibility. High Court dicta on federal versus state responsibility for education prior to the *Work Choices* case, in a state challenge to federal financial support for religious schools, identified education as 'within the State legislative area' with its 'furtherance ... undoubtedly a concern of the State'.<sup>40</sup> The *Work Choices Act* was found constitutional under the Corporations power, through argument of precedent and original and current interpretation of the *Constitution* and federal and state powers, although, in dissent, Kirby J discussed the powers of the Australian government through the Constitution to enact laws in the public interest and to promote a 'fair go'.<sup>41</sup> Public opinion regarding the fairness of the *Work Choices Act* did not coincide with the High Court ruling on constitutionality. The *Work Choices Act* was considered a major issue that led to the change in Australian government in November 2007. By February 2008, the new government had already tabled the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* to begin the transition in reversal of the previous legislation. Clearly the constitutional authority of the Australian government to enact this legislation will not be challenged. However, arguments based on 'public interest' may become assailable, given the power of the people through electoral means.

If the current educational high school matriculation showdown should become a constitutional challenge, the outcome will determine whether an area such as education will be seen as a state power, and possibly the exception to constitutional interpretation that denies any reserve or implied powers for the states, or whether control of all policy will accrete to the Commonwealth government, argued again on the basis of the public good without, and perhaps despite educational evidence to the contrary, evidence to back its move. Given the backdown on the *Work Choices* legislation, this argument might be challenged by the states. Alternatively, if education should become the exception to federal power (although extremely unlikely), future actions to determine the extent of the state power in this area will no doubt abound and be distinguishable from federal-state relationships in other areas.

The second distinguishing case in Australian education law that provides insight into why educational contexts need their own legal consideration was a High Court decision with respect to educational authority responsibility for sexual abuse of students by teachers.

*Lepore* incorporated three appeals by plaintiffs seeking damages from the employing authorities for sexual assault by teachers.<sup>42</sup> The issue was not whether the abuse had occurred as the teachers had been found guilty, but the liability of the employing authority, either through



non-delegable duty or vicarious liability, for a criminal and deliberate act of an employee. The decision in *Lepore* is not a comfortable one.

The High Court held in majority that although negligence could be found for an intentional act, *non-delegable* duty should not apply as an ‘intentional act is of a different character than a failure to take care’.<sup>43</sup> The discussion then turned to whether the employer could be held vicariously liable with the majority appearing to decide that vicarious liability was determined by, and restricted by, the ‘employment test’, that is, a sufficiency of connection between a teacher’s expected role and the intentional wrongdoing, and whether the intentional sexual misconduct could be ‘fairly ... regarded as in the course of the teacher’s employment’ and committed in the course of employment.<sup>44</sup> The High Court then held in majority that the employer could not be held responsible for the deliberate actions of teachers that went beyond any possible definition or scope of their employment functions, even if conducted in the workplace during work time.<sup>45</sup> Vicarious liability would only follow where an employer was at fault in employing an inappropriate person, for example inadequate screening of an employee with a criminal history of sexual abuse.

### A *The Need for a Separate Education Law Field in Australia*

In Queensland, at about the time of the original Queensland trials, and perhaps influenced by such cases, stricter guidelines for adults employed or volunteering in schools (or working or volunteering with children in any venue) have been brought into existence. All such persons must obtain a Blue Card, which involves a criminal check. The Queensland Education Department has developed an extensive manual informing school employees about child safety in schools, including forms for reporting suspected abuse of a child by a school employee to their principal or to the relevant Executive Director.<sup>46</sup> Despite these initiatives to provide safe schools, sexual predation or other misconduct by teachers is likely to reoccur. Do these procedures protect the child or the authority? Can an education authority truly be free from non-delegable duty to a child? Can an adequate level of supervision be implemented for one-teacher schools?

*Lepore* is a case that has led to considerable commentary on the finding.<sup>47</sup> It stands in Australian education law in some ways parallel to *Brown* in the United States, despite the quite contrary direction the two cases have taken with respect to responsibility to provide appropriate education. What *Lepore* has brought to Australian law is problematic discussion of principles of law that have emerged from other legal fields in an application to the context of educational provision.<sup>48</sup> The High Court grappled with a reasonable vicarious liability for the employer and possible retribution for the child, but rejected, despite discussion at some length that would seem to contradict their conclusions, previous considerations of the high level of responsibility owed when there is a special relationship and unequal power between parties, discussion in Kirby J’s words ‘exhibiting a mixture of principle and pragmatism’.<sup>49</sup> Despite judicial discussion, the final decision ignored the education context where the potential victims of any negligence are not only minors, but also compulsorily required to be in the presence, for long periods of time, of the alleged perpetrator.

Educational authorities, principals, teachers, students and their families in Australia are much more aware of legal recourse than in the past — each with their own concerns and interests. Legal practitioners are busy with advice on a range of matters. The need for judgments to recognise educational contexts — rather than argument by analogy to business models that do not involve minors, in unequal relationships with teachers, in a range of circumstances — will surely grow. Such expectations already apply in matters of family law, for example, if a dispute about a child’s residence reaches the court, the decision made is not based only on which parent has the highest

income. The courts similarly need to develop appropriate bases for argument from the education law field.

#### IV CONCLUSION

Both the US and Australia have or are argued to have definable fields of education law that share a fundamental concern about the respective roles of federal and state governments. The seemingly inexorable press to standardise education through federalisation, as represented by *Individuals with Disabilities Education Act* (IDEA) and the *No Child Left Behind Act* (NCLB) in the US, and federal statutes and possibly the Work Choices precedent in Australia, not only mirror the development of education law as a separate field in the two countries but provide a powerful rationalisation for further development of that field.

*Brown* in the US has generated a rights-conscious approach to education that has schools being run not by '[l]ocal school boards, [but by] the courts'<sup>50</sup> and, one can argue, *Lepore* in Australia would accord courts in that country a similar function with what may well end up being quite similar results. Thus, while US courts repeatedly 'find it necessary to create ad hoc exceptions to its central premise [of constitutional rights in *Tinker*]',<sup>51</sup> courts in Australia will most assuredly struggle with ad hoc pronouncements in subsequent cases as to the parsing of what constitutes delegable functions and intentional actions, and the relevant responsibilities of authorities and individuals in the provision of education. The ultimate results in both countries would seem to be that: (1) their judiciaries will have a continuing and increasing role in determining acceptable standards for education; and, (2) those determinations will correspondingly result in a proliferation of new case law.

In the end, the consumer demand for education law-knowledgeable attorneys and education law-minded educational practitioners will increase exponentially. Education law as a distinct field will find its way into continuing legal updates for attorneys, as well as into the academic courses and workshops preparing and updating school teachers and administrators.

*Keywords:* education law; legal practitioners; education practitioners; litigation; education legislation; education regulations.

#### ENDNOTES

1. See discussion of compulsory attendance in Brooke Wilkins, 'Should Public Education Be a Federal Fundamental Right?' (2005) *Brigham Young University Education & Law Journal* 261.
2. National Centre for Education Statistics, *Overview of Public Elementary and Secondary School Districts: School Year 1999-2000* (2001) National Centre for Education Statistics <[www.nces.ed.gov/pubs2001/overview](http://www.nces.ed.gov/pubs2001/overview)> at 12 September 2007.
3. While courts frequently declare that their role is not to run schools, the courts have engaged in an on-going dance between according rights to students and then granting greater control to school officials over those students. Cf *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969) (seminal Supreme Court decision reversing suspension of students wearing armbands in opposition to Vietnam War where the students' expression did not disrupt the educational process) with *Morse v Frederick*, 127 S Ct 2618 (2007) (upholding suspension of student who displayed banner during a school-sponsored activity, as long as a school principal who punished the student reasonably believed that the message on the banner promoted drug use in violation of school policy, even though the banner caused no disruption).

4. Despite the lack of delegated power to the federal government over education in Art. I. Sec. 8 of the Constitution, some would argue that Congress through its power of the purse in such legislation as the *Individuals with Disabilities Education Act* (20 U.S.C. §§ 1400 et seq.) and *No Child Left Behind* (20 U.S.C. §§ 6301 et seq.) has moved significantly in the direction of federalising all education.
5. The *Australian Constitution* has an Establishment clause (s 116) similar to that of the United States' *Constitution*, but interpreted in education in Australia in an apposite manner.
6. *Australian Constitution* s 80.
7. *Nationwide News Pty Limited v Wills* [1992] HCA 46.
8. See, for example, the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
9. Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), *National Report on Schooling in Australia 2005* (2007) Appendix 1: Statistical Annex, Table 3 <<http://cms.curriculum.edu.au/anr2005/index.htm>> at 10 September 2007. In Australia, public schooling is controlled centrally by appointed public service authorities in each of the six states (New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia) or territory (Australian Capital Territory, Northern Territory). While within each state or territory, school districts control regional matters for school, all educational policy, content and processes are administered following the state or territory directions. All teachers within public schools are employed by the state or territory governing authority, not the individual school, and may be required by the state authority to work in any location in the state.
10. For example, *Uniform Civil Procedure Rules 1999* (Qld), r 320.
11. Personal communications, state legal officers, school staff.
12. For example, an independent school settled a case involving a child with reading problems, following a challenge brought by his mother under the *Trade Practices Act* (E. Hannan, 'School Payout for Boy's Reading Failure', *The Australian* (Sydney), August 15 2006).
13. In 2005, 32.8% of elementary and secondary schools attended non-public schools (Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), (2007) *National Report on Schooling in Australia 2005* Appendix 1: Statistical Annex, Table 4 <<http://cms.curriculum.edu.au/anr2005/index.htm>> at 10 September 2007).
14. *West's Education Law Reporter* publishes all reported K-12 and higher education law cases, approximately 2000, per year, but that number does not include reported administrative decisions primarily from special education law disputes.
15. 461 US 574 (1983).
16. 347 US 483 (1954).
17. Revenue Ruling 71-447, 1971-72 Cum. Bull. 230 defined 'racially nondiscriminatory policy as to students' meaning that:  

[T]he school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.
18. *Bob Jones University*, 461 U.S., 581-82.  

*There is to be no interracial dating*

  1. Students who are partners in an interracial marriage will be expelled.
  2. Students who are members of or affiliated with any group or organisation which holds as one of its goals or advocates interracial marriage will be expelled.
  3. Students who date outside their own race will be expelled.
  4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.
19. *Ibid* 593. ('An unbroken line of cases following *Brown v Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.')

20. The irony of the Bob Jones University case is that the University continued to function for a number of years after the decision without tax exempt status, thus reflecting that the Court's decision did not initially achieve its purpose of eradicating discrimination. However, the University eventually decided to eliminate its interracial marriage and dating admission requirements and its tax exempt status was restored.
21. See, eg, Ralph Mawdsley and Steven Permut, '*Bob Jones University v. U.S.: A Decision with Little Direction*' (1983) 12 *Education Law Reporter* 1039.
22. At least one author has suggested a reason for ignoring the Bob Jones University decision. See Virginia Nordin, '*Bob Jones University: A Case Comment*' (1984) 13 *Education Law Reporter* 921, 930 ('This unfortunate decision may also encourage the very opposition it seeks to eliminate, by angering with a sense of injustice, and by creating a precedent for the undermining of pluralist values basic to the American democratic system.').
23. Equity power is the inherent authority of federal courts to control public schools through the use of injunctions and declaratory judgments for the purpose of protecting the rights of students and employees in those schools.
24. For one extraordinary example of federal control over an urban school district in a desegregation case where the expenditure of over \$2 billion did not prevent the entire school district being deaccredited for poor student performance, see Ralph Mawdsley, '*Missouri v. Jenkins: Remaking an Urban School District*' (2000) 33 *Education and Urban Society* 36.
25. Among statutes addressing employment, see, eg, Title VII of the *Civil Rights Act of 1964*, (42 U.S.C. § 2000 *et seq.*) which prohibits discrimination on the basis of race, colour, religion, sex, and/or national origin, and the *Age Discrimination Act in Employment Act of 1967* (ADEA) (29 U.S.C. § 621 *et seq.*).
26. For statutes conditioned upon reception of federal funds, see, eg, the *Rehabilitation Act of 1973* (s 504) (29 U.S.C. § 794) that prohibits discrimination on the basis of disabilities and Title IX of the *Educational Amendments of 1972* (20 U.S.C. § 1681 *et seq.*) that prohibits gender discrimination.
27. To contact ELA, [www.educationlaw.org](http://www.educationlaw.org).
28. For an example of such texts see, William Valente and Christina Valente, *Law in the Schools* (6<sup>th</sup> ed, 2005); Mark Weber, Ralph Mawdsley and Sarah Redfield, *Special Education Law: Cases and Materials* (2<sup>nd</sup> ed, 2007).
29. See Sarah Redfield, 'The Convergence of Education and Law: A New Class of Educators and Lawyers' (2003) 36 *Indiana Law Review* 609.
30. See Todd de Mitchell and Thomas Carroll, 'A Duty Owed: Tort Liability and the Perceptions of Public Opinion' (2005) 201 *Education Law Reporter* 1.
31. See Sarah Redfield, 'A Cautionary Tale of the Lawyer and the Educator' (2003) 18 *Maine Bar Journal* 198 (discussing the practical dialogue that needs to occur between attorneys and educators regarding legal liabilities).
32. *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 was an appeal under the *Disability Discrimination Act 1992* (Cth), against the exclusion of a child for violent behaviour, based on the argument that the behaviour was a consequence of brain damage and a disability, and that the exclusion was therefore direct discrimination based on disability. Chief Justice Gleeson argued that an act needs to be construed in relation to the 'functions, powers and responsibilities' of the authority and that the context cannot be ignored [7]. The appeal was disallowed on the basis that the principal's decision was made on the basis of his duty of care to other students, not on the basis of the student's disability. The decision was a 5-2 majority with McHugh and Kirby JJ dissenting and following the reasoning in the original decision of the Human Rights and Equal Opportunity Commission, reversed by the Full Court of the Federal Court on the basis of 'draconian consequences' (cited at [18]). McHugh and Kirby JJ objected to a narrow reading of the Act to reduce the burden in different contexts and argued that different paths were available to the respondent. However, cf *Scott and Bernadette Finney v The Hills Grammar (sic) School* [1999] HREOCA 14, where, by contrast, the Human Rights and Equal Opportunity Commission (HREOC) found that a school that had denied enrolment to a student based on the adequacy of its resources to make accommodations for her disability (spina bifida), did

not satisfy an argument of ‘unjustifiable hardship’ and that discrimination on the basis of disability under the Act had occurred. The School sought judicial review of the HREOC decision but in this case the finding was endorsed by the Full Court of the Federal Court: *Hills Grammar School v Human Rights & Equal Opportunity Commission* [2000] FCA 658.

33. This forum, known as the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), meets regularly to discuss educational policy and matters. The first statement of national goals of schooling occurred in 1989, but was revisited with strength in *The Adelaide Declaration on National Goals for Schooling in the Twenty-First Century* (1999) <<http://www.mceetya.edu.au/mceetya/default.asp?id=11576>> at 10 September 2007.
34. ABC, ‘Testing Times for Education Funding’ *ABC News*, 10 September 2007 <<http://abc.net.au/news/stories/2007/08/01/1993692.htm>> at 10 September 2007.
35. *Australian Constitution* s 51(xx).
36. New South Wales, Western Australia, South Australia, Queensland, Victoria supported by Tasmania and the two territories. The plaintiffs argued the Commonwealth’s use of the corporations power (s 51(xx) of the Constitution) did not override s 51(xxxv) that gave the Australian Government only authority for conciliation and arbitration of industrial disputes beyond state boundaries to underpin what the legislation described as ‘a framework for cooperative workplace relations’. The plaintiffs also ‘argued that Parliament’s power to make laws with respect to foreign, trading and financial corporations was limited in one or more ways. They submitted that section 51(xx) was limited to laws with respect to the “external relationships” of such corporations. The external relationships of corporations, and the trading and financial activities of such corporations, were said not to include relationships between a corporation and its actual or prospective employees’. (Public Information Officer, High Court of Australia, 14 November 2006, release, <[www.hcourt.gov.au/media/WorkChoicesdecision.pdf](http://www.hcourt.gov.au/media/WorkChoicesdecision.pdf)> at 10 September 2007).
37. *New South Wales v Commonwealth (Work Choices case)* [2006] HCA 52.
38. *Ibid*.
39. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ case)* [1920] HCA 54; [1921] HCA 30.
40. *Attorney-General (Vict.); Ex Rel. Black v The Commonwealth* [1981] HCA 2, [38]: Barwick CJ.
41. Kirby J, dissenting, *New South Wales v Commonwealth (Work Choices case)* [2006] HCA 52. [519].
42. *New South Wales v Lepore* [2003] HCA 4. *Lepore* incorporated appeals by three plaintiffs, Lepore, Samin and Rich in two different jurisdictions, New South Wales and Queensland, seeking damages from the employing authorities for sexual assault by teachers. Lepore was a seven year old boy in a public school in New South Wales, Rich and Samin were two young girls who attended a one-teacher rural public school in Queensland. In both cases, the teachers were convicted of the assaults, in the Queensland case, with imprisonment following.
43. Prue Vines, ‘*New South Wales v Lepore; Samin v Queensland; Rich v Queensland: Schools’ Responsibility for Teachers’ Sexual Assault: Non-Delegable Duty and Vicarious Liability*’ (2003) 27 *Melbourne University Law Review* 612, 614 (case reference 423). This point reversed previous determinations that education authorities are required to take reasonable care to avoid risk of injury that is reasonably foreseeable, that is, not fanciful, in order to prevent injury and that such a duty of care was not delegable: *Commonwealth v Introvigne* (1982) 150 CLR 258, [27]. *Introvigne* involved a physical injury to a teenager ‘skylarking’ with friends before school. The case was initially argued as vicarious liability, with the Appeal Court finding there was a non-delegable duty by the education authority to ensure reasonable care was taken, particular given the special nature of the child who needed protection, and the liability was the negligent failure of the teachers acting in the course of their ordinary employment.
44. *New South Wales v Lepore* [2003] HCA 4, Gleeson CJ, [74].
45. *Ibid* [40].
46. Education Queensland, *HS-17: Student Protection* (2006) <<http://education.qld.gov.au/strategic/eppr/students/smspr012/>> at 17 September 2007.

47. Commentators have argued that the ratio decidendi in *Lepore* is difficult to extract, confusing and problematic for future application, see, eg, Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does LePore Leave Australia' (2004) 28 *Melbourne University Law Review* 169, 182. Already, the appeal courts in two business cases have avoided clarification of the opinions in *Lepore* (*Ffrench v Sestili & Sestili V Triton Underwriting Insurance Agency P/L* [2006] SASC 4; *Ryan v Ann St Holdings P/L* [2006] QCA 217), with one appearing to endorse vicarious liability for an intentional wrongdoing by an employee in an employment context, despite counsel for the defence 'boldly' submitting that the case provided such an opportunity for the Court to provide more certainty about the law after *Lepore* (*Ryan v Ann St Holdings P/L*, [14]).
48. It is arguable that the High Court decision in *Purvis* (*Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 (see above n 29) demonstrates the same complexity of judicial reasoning to justify a decision in an educational context.
49. *New South Wales v Lepore* [2003] HCA 4, [300].
50. *Morse v Frederick*, 127 S Ct 2618, 2635 (2007) (Thomas, J., concurring) (arguing for a reversal of *Tinker v Des Moines Independent School District*, 393 U.S. 503 (1969) that accorded constitutional rights to students in public schools).
51. *Ibid.*