AUSTRALIAN LEGAL EDUCATION COUNCIL

AUSTRALASIAN COMMERCIAL AND ECONOMICS TEACHERS' ASSOCIATION

NATIONAL CONFERENCE ON LEGAL EDUCATION IN SCHOOLS

UNIVERSITY OF WESTERN AUSTRALIA, 11 JANUARY 1983

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The Hon. Mr. Justice M.D. Kirby, C.M.G.
Chairman of the Australian Law Reform Commission

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INTRODUCTION TO TWO THEMES

The public speaker in Australia is the last of the frontier breed. He must be prepared to live out of a suitcase, when others romp at home with their children. His aesthetic tastes will be blunted by the assault upon them of that odd mixture of vinyl, plastic and faded art deco styles which mark Australian hotels. He must develop a positive passion for airline food. And he must be prepared to speak as required, never mind his limited areas of expertise.

I am no expert in educational matters. I certainly have no special talent in curriculum design. I have never taught law, in a formal sense, to law students, let alone lay students. Yet, over the years, I seem to have addressed countless conferences on legal education in schools. I do so again, because I strongly support the notion that our community should do more to educate its future citizens in their legal rights and duties. Since I took up this banner, early in my term as Chairman of the Australian Law Reform Commission some 8 years ago, marvellous strides have been made in all parts of our country in teaching law to the people. I propose to review the developments. Then, because I have been asked to do so, I will turn to a second theme. It is the theme I have given to the title of my address. It is both a prediction and a warning to all who are engaged in education in Australia. It is the cry 'The lawyers are coming'. By reference to some recent developments in the United States, both in the fields of negligence and administrative law, I plan to show what may be round the corner in Australia for the relationship between teachers and the law. We tend, in this country,

in matters of commerce, entertainment, technology and the law to follow in the wake American developments. The beginning of a new year is a time for futurologists. If want to bring a little science into that much abused vocation, the futurologists amongst do well to look closely at developments in the United States.

This talk, then, falls into two parts. The first will review the state of the art legal education in Australian schools. I shall seek to advance the reasons why we should l concerned. I will mention important new evidence in the United States which tends suggest that teaching law in schools can itself be a contribution to a more peaceful ar law abiding society. At the request of the organisers, I will then turn to the subject of tl law and teachers. First, the state of the art.

LAW IN SCHOOLS: STATE OF THE ART

Victoria: The leader in teaching law and law-related subject in Australian schools remain Victoria. The subject 'Legal Studies' has been taught as a fully accredited Year 12 subject accepted for university entrance purposes since 1973. Approximately 7,000 students hav studied the subject each year since 1977. It is being taught in almost every secondar school in Victoria.

'Introductory Business Law' was introduced into Victorian secondary schools as an accredited Group 2 subject at Year 12 level in 1981. Group 2 subjects are currently not accepted by the universities for matriculation entrance purposes. About 20 schools are likely to be offering this subject in 1983. This is a more specialised course whose stated aim is to equip students in their transition from school to the workforce and community by developing special skills, together with an understanding of and ability to use selected areas of business law. Year 11 Legal Studies is also being taught as a full year subject for about 4 years a week in almost every secondary school in Victoria. The content varies from school to school as there is, as yet, no State-wide accreditation of the course. But the subject usually contains core material similar to that listed for Year 12. Approximately 15,000 Victorian senior secondary school students are taking the course in Legal Studies at Year 11.

Selected aspects of legal education have been taught for several years in middle secondary schools in Victoria. For example, the subject 'Consumer Education' was introduced in schools in middle 1960's and it has a high component of legal studies. In the

early years, the material tended to be restricted to consumer protection, insurance, banking, real estate and like matters. In recent years, it has been broadened considerably. It is now not uncommon to have a broadly based legal studies unit as part of the subject. Such a unit will take the students to an examination of the court system, the criminal law, the motor car and the law and the family and the law. Units of study in Legal Studies have been introduced into almost half of the Victorian schools. The subject is usually taught on a one term basis for approximately 3 hours a week. The most common units are 'The Police', 'The Court System', 'Introduction to the Legal System', 'Children and the Law', 'Shop Stealing', 'Legal Rights', and 'The Small Claims Tribunal'. In addition, elements of legal studies are included in other subjects, such as general studies courses, home economics and social studies.

In junior secondary and primary schools in Victoria, there have been few State-wide initiatives taken in law-related studies. However, a number of booklets have been published by the Victorian Commercial Teachers' Association with teaching materials for use in introductory legal subjects in the early years of formal education.

New South Wales: It is seven years since the first initiatives were taken by the Law Foundation of New South Wales to encourage the development of legal studies in the schools of that State. The Law Foundation has supported the High School Law Project (HELP). In this time it has produced the newspaper Legal Eagle, teaching material and a great deal of advice to stimulate interest in the subject amongst New South Wales teachers and educational authorities.

There is no subject of Legal Studies taught in New South Wales schools. Instead, curriculum guidelines have permitted and even encouraged the incorporation of a legal component in appropriate courses already being taught. The new Commerce syllabus, for example, has placed law as one of the several compulsory areas of study. This Commerce syllabus will be implemented in 1983 as an elective subject in New South Wales secondary schools.

Teachers who for some years have recognised the scope that exists in the junior curriculum to offer courses on aspects of the law, tend in New South Wales to be the same teachers who have more recently seen the benefit of offering school-based courses to their senior students. These courses, of which there are now over 100, must be approved by the Board of Secondary School Studies before they can be offered to Year 11, 12 or both. They cater for the needs of the individual school. They have proved to be very popular with schools in New South Wales. In respect of law and law-related studies, the Board's register of courses for 1982 showed the existence of:

13 politics/government courses - involving constitutional studies and law;
28 business/accountancy/taxation courses - involving appropriate legal aspects;
23 law/legal studies courses;
24 consumer and law courses;
4 commercial law courses;
1 everyday law course.

making a total of 73 courses at senior secondary school level, devised by the schools themselves and having a legal component.[2] Another statutory board, The Secondary Schools Board, which has the responsibility for the curriculum in Years 7 to 10 has recently permitted schools to devise similar courses designated School Courses. It seems likely that there will be similar penetration of legal subjects into junior secondary schools in this way. In the primary school, social studies has always been and continues to be part of a 'core' learning activity. In 1963 the social studies curriculum in New South Wales was organised to deal broadly with teaching about other lands and peoples. This syllabus considered that aspects of parliamentary government and the constitution should be left substantially to the 6th Grade.[3] The current edition highlights the conceptual underpinning of many of our social institutions such as the law, the judiciary, government, parliamentary democracy, the police and other law enforcement agencies. It does this by permitting teachers to deal with these matters, not in a prescribed way related to a particular year of schooling, but as appropriate to the real stage of the development of children regardless of age.

The Education Department of New South Wales and the Law Foundation of that State have been associated since 1974 when the Law Foundation allocated funds to raise the awareness of high school students concerning the law. The Department co-operated by selecting schools to trial the publication Legal Eagle and by providing advice on the suitability of content. Then in 1977, the High School Education Law Project was jointly funded by the Curriculum Development Centre in Canberra and by the Law Foundation. The N.S.W. Education Department made available an experienced secondary teacher to join the project on a full-time basis. Advances were made for the provision of services to a large number of secondary teachers throughout New South Wales, the production of a range of publications and the holding of a series of seminars for teachers. More recently the joint appointment of a Legal Studies curriculum consultant by the Department and the Law Foundation can be taken as a recognition of the need to co-ordinate the various interests in law-related education in that State. In a Discussion Paper issued by the Board of Senior School Studies which outlines proposals for

restructuring the senior school curriculum, reference is made to the popularity of law related studies as an 'other approved course'. The Law Related Education Teachers' Association responded to this Discussion Paper by recommending that Legal Studies be introduced as a formal matriculation subject at matriculation and non-matriculation levels within the proposed new system. It would seem to me to be only a matter of time before New South Wales follows the trend of other States and introduces a basic subject 'Legal Studies' in the senior school curriculum. This is not to say that New South Wales should not persist with efforts to provide legal studies on a broader base for a wider range of students in the general school program. One of the advantages of Federation is that we may experiment. We may try different approaches in different parts of the country. These no monopoly in wisdom. In breaking new ground, and teaching law-related subjects to the laiety, should keep an open mind about matters of content, depth, purpose and methodology.

South Australia: Four years of effort in South Australia will come to fruition in February 1983 when the curriculum statement Legal Studies in the Secondary School is published. This statement provides guidelines for schools which wish to introduce new courses in Legal Studies approved for Year 11 and Year 12. These courses are alternatives to matriculation courses. Until now, law has only been taught in South Australia in Year 11 in a half semester block. Discussions are being had with universities, legal and educational bodies in order to secure recognition of legal studies as a matriculation course in South Australia. It may be hoped that as a result of these discussions the course which resembles that offered in Victoria will be approved for matriculation purposes. In South Australia, part of the problem in the way of offering the course in Legal Studies in a wide range of schools has been the lack of trained teachers. There is a 'Catch 22' irony as has been pointed out:

> Currently in South Australia it is not possible for a trainee teacher to undertake a major study in law in any of the Colleges of Advanced Education. The Colleges have indicated their desire to offer these courses, but whilst there is no matriculation course, they do not consider they can fund such a program.[4]

I repeat the expression of my hope that university and other people who make decisions about matriculation qualifications in South Australia, will study what is happening elsewhere throughout the country. The Keeves report on Education and Change in South Australia, published in January 1982, urged the development of a more flexible school curriculum to meet the need of more flexibility and greater perceived interest and relevance in school courses. Flexibility may equip Australia to meet the challenges of a time of rapid change - including technological and social change. Perceived relevance and attractiveness may help us to reverse the shocking statistic that puts

us towards the bottom of the OECD league in secondary school retention.[5] What the Keeves report said for South Australia applies generally throughout the country. Curriculum experts should, I think, draw inferences from the large numbers of secondary students who flock to the colours of law related studies because the subject is seen to be both interesting and relevant for life after school.

In junior schools in South Australia, some official lip-service has been paid to law-related education. Interest has been expressed in developing law as a subject extending across Years 8 to 10. At present Social Studies students in these years are taught a Learning and Living unit which includes legal aspects.

Western Australia: In Western Australia, the most recent development in Years 10 and 11 has been the introduction of a Law course in Year 11 in 1979 and in Year 12 in 1980. So far, the course does not have matriculation status. In the junior school, a recent development of importance to law-related education in Western Australia has been the introduction of the K-10 Social Studies syllabus. Major themes have replaced the previous topic based course. The theme 'decision-making' for example replaces 'government and law' which was previously taught in Year 9. Law is now treated as a subject in the new theme in Year 8. The syllabus lays emphasis upon skills, values and attitudes: topics which are central to the operation of the law. With appropriate curriculum assistance and teacher training, a useful and interesting commentary on legal subjects could be grafted onto the new Western Australian syllabus. The syllabus recognises that legal understanding and awareness can be progressively developed in junior secondary schools and need not be the exclusive concern of the senior years.

Queensland: Late in 1981, the Queensland Board of Secondary School Studies which is responsible for the subjects taught in secondary schools in that State, agreed to the development of a Legal Studies course for Year 11 and 12 students. The work on the development of the course is being undertaken by a sub-committee of the Commercial and Social Science Subject Advisory Committee. As in New South Wales, the study of legal topics has, until now, been integrated into a number of subjects and courses at various levels in the present Queensland school curriculum. Law has not been taught, so far, as a separate discreet and easily identifiable course of study. For instance, law and society appears in Year 2 Primary Social Studies, Year 7 Primary Social Studies and Year 12 Study of Society. All courses adopt the approach of examining rights and responsibilities, again matters apt for treatment with legal illustrations.

The Queensland Legal Studies committee is at present making a thorough evaluation of the courses offered in all Australian and some overseas schools. A rationale and framework for the course has been established. It is expected that the draft syllabus will be prepared for trial operation by mid-1983. It may be hoped that the report of the Queensland sub-committee will be published widely. It is prepared at a stage of dynamic development in law related studies in Australian schools. It would certainly be useful for all of us to have a thorough review which analyses both the present position and the perceived strengths and weaknesses of the approaches taken in the different States of Australia.

Tasmania: Legal Studies was first offered as a subject in the Tasmanian senior schools in 1980. It was given status as a matriculation subject in 1981. In 1982, 400 out of 650 students took legal studies at a matriculation level. Every Government secondary college and several non-Government schools in Tasmania offered the course in Legal Studies.

The rapid development of the subject in Tasmania and its speedy recognition for matriculation purposes have been attributed to:

* active persuasion by teachers who themselves saw the value of legal studies and its relevance both to the students and the teachers and to society;
* the complete support and a great deal of help given to the development of the curriculum and the introduction of courses by the Law Faculty of the University of Tasmania;
* total agreement among all parties that the subject must be a study of law in its social context and should not be seen as a crash course in law as such. The object is not to turn out a nation of lawyers but to produce a society of citizens with respect for, knowledge of and healthy criticism about the law as it operates;
* the fourth factor in the success of the Tasmanian venture was the participation of consultants from New South Wales, Victoria, South Australia and the A.C.T. in in-service teacher programs, course development and the preparation of course material;
* the secondment of a teacher to develop the courses was also of critical importance;
* the support from experienced teachers with substantial legal backgrounds has likewise played an important part in the success of the introduction of legal studies in Tasmania. Interestingly enough, one-half of the teachers who are giving instruction in Legal Studies in that State either have full law degrees or several units of a law course.

One might add to these factors the relatively small size and small population of Tasmania It is sometimes said, not always with humour, that the New South Wales Educatio Departm ent is the largest educational bureaucracy outside the Soviet Union. I cannot sa if this is true. But the introduction of change is sometimes easier in places where th institutions are smaller and the number of empires to be disturbed are fewer.

In junior schools in Tasmania, courses which emphasise the rights an responsibilities approach have, so far, been popular. The secondary Social Science progran has been renewed in Tasmania. It incorporates a law-related approach. This new progran will be given trials in 1983 in nearly all Tasmanian schools.

Resume: I do not have information on the Australian Capital Territory and the Northerr Territory of Australia. But the above review will indicate the enormous developm ents that have occurred in teaching law to students at school. Tribute must be paid to the dedication of a relatively small band of teachers. Some of them have been fired with an evangelistic spirit, probably not seen since St. Paul's day. A lot is happening and the dynamic is still at work. We are in the midst of a major change. It involves not simply a perception of what it is relevant to teach future citizens in our schools. More fundam entally, it involves the changing perception of the relationship between the citizen and the law. No longer is the law something laid down from on high to be obeyed willy-nilly, even if you do not know it, cannot find it and when found, do not understand it. At the heart of the great movement in Australia, that is so successfully introducing instruction in legal topics in our schools, is the belief that the law will be improved if our people feel a responsibility for its content. When the law was only the judges' business, or the politicians' business, or even the lawyers' business, injustice would be tolerated with resignation and apathy. When the law becomes the people's business, there is greater likelihood of questioning of the legal process and its institutions, personnel and rules. This will be more uncomfortable for lawyers. But it will be healthier for the long term respect for the law and for the rule of law in Australia. That is why the penetration of legal studies in our schools is important and urgent. It assumes an additional edge of urgency as we face the prospect, small but real, of social breakdowns accompanying long term economic and technological disruption. The storming of Parliament House Canberra last year was not the beginning of a revolution. It was not even the symptom of a revolution. But it was a warning to those who respect our institutions and want to make them survive and work sensitively. An informed people, instructed broadly in their basic legal rights and duties and with knowledge of their government and legal institutions will be more likely to support those laws and institutions than a people kept in ignorance.

LAW IN SCHOOLS: WHY SHOULD BE CARE?

Apart from this general philosophy, there are practical reasons why we should care about spreading basic education about the law in Australian schools. I have dealt with this elsewhere and I will not repeat what I have said.[6] But now, from the United States, there is new evidence of the further important and very practical reason for supporting law-related education in schools. A nationwide study, funded by the United States Federal Office of Juvenile Justice and Delinquency Prevention suggests that law-related education may reduce juvenile delinquency. The study, which involved 323 senior high school students in six communities throughout the United States found that where law-related education was properly implemented, students tended to have a better self-image, a lesser tendency to resort to violence, a lesser feeling of isolation from teachers, other students and the community's institutions. Compared with the control groups, which were receiving no instruction in law-related education, students in legal studies classes in United States secondary schools committed fewer offences, fewer acts of violence against other students and fewer violations of school rules. The evaluation offered an analysis of why this should be so:

> Compared with other parts of the school curriculum, LRE appears uncommonly suited to affecting favorably all sox of the behavior-related dimensions...In terms of commitment, students report valuing LRE more highly than most other classes. LRE offers occasions for building attachment, not only to representatives of the school, but to law enforcement and justice system personnel as well. Because the subject matter connects especially well to the world outside the school and makes students enthusiastic participants in a useful learning experience. LRE increases involvement in conventional activities. By conveying an understanding of the basis and necessity for rules and principles embodied in the justice system, LRE instruction creates a foundation for heightened belief in the moral validity of social rules. Recommended LRE teaching strategies are designed in part to offer all students opportunities to participate actively and excel; a consequence is greater equality of opportunity than is present in most classrooms. LRE provides a setting conducive to positive labeling of students; after their exposure to students in an LRE classroom, teachers, police, and justice personnel report viewing and reacting to these young persons more favorably. According to the theoretical perspective outlined here, favorable change in these six dimensions should increase the probability of association with nondelinquent (rather than delinquent) peers and in turn reduce the likelihood of delinquent behavior. In addition, some of the

> recommended strategies feature cooperative tasks that appear capable of affecting friendship choices directly...In brief, LRE holds high potential for improving students' behaviour. The evaluation findings reported here show that an appropriate combination of LRE content and strategies can realize this potential. The findings also reveal that the absence of critical features in an LRE program can result in no measurable effect or can produce a worsening of students' behavior. This unfortunate consequence occurred even in some classes that did quite well in increasing students' knowledge of the law. Clearly, realising LRE's potential to affect behavior favorably requires considerable care and awareness.[7]

A commentary in the American Bar Association Journal concluded:

> These findings are in line with other evaluations which show that classes in law are helping youngsters to understand our system better and have more constructive attitudes towards it. Evaluations conducted by projects great and small in all parts of the country have shown that students [and teachers] who receive instruction in law-related subjects do learn how the system actually functions and do tend to think they can make a difference.[8]

Now, one must approach the United States material with care:

* The sample is a relatively small one in a huge country with less homogeneity than we have in Australia.
* The American society is much more permeated with law, civil rights, courtroom resolution of issues, due process, the Bill of Rights and so on than in the case in Australia. It is, perhaps, more natural and urgent that Americans understand law because it, even more than here, is a chief driving force of their community.
* Transposing conclusions in another society to Australia's is always difficult. The problem of juvenile crime is much greater in the United States than in Australia and therefore what works in that community may not work here.

Making every proper allowance for the difficulty of transfering the American experience to Australia and the changes that must be made in the process, it is important that this latest American information should be studied and carefully considered. In a sense, it seemed to bear out one's expectations. People will be more likely to respect institutions and see their relevance, justification and function more clearly if they understand how things work. Alienation is a great problem of the modern metropolitan community.

Misinformation is another problem - whether it comes from bush lawyers in the school playground or from television programs which trivialise and distort, over-dramatise or mis-state the law and misrepresent its personnel. At the very least, the recent survey evidence from the United States tends to support the value of law-related education in our schools. As youth unemployment and alienation become more serious and endemic problems in Australian society, it will be vital that our community examines everything it can do in order to reduce the alienation and to associate young people with its laws and institutions. The American commentator again:

> Slogans are never enough to solve problems. The only way to guarantee the long-term health of our democracy is to see that the voters and leaders of the next decades have the ability to sort out facts, see other perspectives, reason and make appropriate decisions. I believe no discipline is better suited than law-related education to develop these skills...We live in a period of widespread alienation, of apathy towards governmental processes and cynacism about democratic ideals. Law-related education will establish more informed and constructive citizen participation in affairs of our national as well as our neighbourhoods.[9]

This commentator urges that law in schools should not be just a 'warmed-over version of civics, an academic graveyard that most of us remember with a shudder'. He suggests that it should be focused on what he terms the three new R's - rights, responsibilities and reasoning. We hear a lot nowadays about return to the three R's in education. Perhaps, it should be at least six R's, if we add rights, responsibilities and reasoning to the Australian school curriculum. No group is better placed to offer instruction in the three new R's than teachers of law-related subjects. It is no exaggeration to say that instruction in the three new R's maybe just as vital for the future of our country as instruction in the basic skill of literacy and numeracy.

LIABILITIES OF TEACHERS: PHYSICAL INJURIES

I now turn to the second topic of this talk. I do so because I was invited to develop for you certain comments I made at Whyalla in March 1982 on the legal and social responsibilities of teachers.[10] I do not have to discuss at great length the whole range of the operation of the law on teachers. Within the past year, at least two books have been published, with an up-to-date general conspectus on this topic.[11]

Furthermore, so far as the liability of teachers and schools (at least public schools) for injuries to their pupils is concerned, we now have the benefit of the recent decision of the High Court of Australia in The Commonwealth v. Introvigne.[12] In that case, some 11 years after it happened, Rolando Introvigne secured a favourable decision from the final Court concerning the liability of the Commonwealth for serious injuries he suffered when injured whilst skylarking in a school quadrangle. The teachers normally engaged in supervising 900 pupils in the recreation area were almost entirely absent attending a staff meeting as a result of the death of the Principal. In the consequence, the Court held that there was no adequate system to secure the safety of the pupil and that playground supervision was inadequate. The whole Court determined that there was a reasonable forseeability of an injury arising from the possibility that boys would swing on the halyard attached to the flag pole. Accordingly, there was negligence in failing to provide adequate supervision at the time when the injury occurred and in failing to padlock the halyard to the pole. Three High Court justices held that independently of vicarious liability for the acts and omissions of the teaching staff, the school authority was itself under a direct duty to children attending its school to ensure that reasonable care was taken for their safety. This was a duty, it was held, the performance of which could not be delegated.

There has already been sufficient discussion of this case both in legal and educational journals.[13] Care must be taken in applying the principles stated to private schools, where differing contractual arrangements may exist between parents and children, on the one hand, and the school authority on the other. But the duty of the educators to school children in their care, for physical accidents, explosions in science laboratories, injuries received on excursions or camps, slippery school corridors and so on, is all well established law. There is nothing terribly novel in the application of the principles of negligence. In our legal system, those principles ask the questions: Is there a legal duty of care to the person injured? Has there been a breach of that duty? Did the breach lead to compensable damage?

LIABILITY OF TEACHERS: ADMINISTRATIVE ERRORS

Much more controversial are the subjects of administrative mistakes and poor quality teaching leading to less readily measurable injury, but injury nonetheless. It was this topic I raised in my address at Whyalla. The cries of outrage and shock that occurred

.n some teaching and teacher union quarters will not restrain me from raising them once again for your consideration. In doing so, I neither wish to raise false hopes of the anti-education brigade nor false fears on the part of anxious teachers. It should be said at the outset that the law in Australia would not appear at present to provide effective remedies for injury to a pupil through poor teaching or administrative misassignment of a pupil. At least in respect of education in public schools, there may be no legally enforceable duty to the child or his parents that can be brought home by legal action against the Minister personally, the Department or its officials, teachers or the Crown.[14] General statutory duties such as the duty 'to afford the best primary education to all children' have been held in our courts not to be judicially reviewable because the language chosen was too vague.[15] In determining whether a statutory duty is sufficiently specific to give rise to a remedy for its breach, many difficult legal hurdles must be overcome. The position will differ from one education statute to another. It will differ yet again in respect of educational arrangements which are contractual - as with private and Catholic schools. A further problem in the way of success in Australia, lies in the notions of compensable injuries. The law provides strong protection to persons who have suffered physical injury as a result of the failure of educational authorities to exercise appropriate levels of care and diligence. As it presently stands, the law is ill-equipped to cope with the problems of a person, whether a parent or child, who complains of a bad decision relating to education but cannot point to any consequential compensable injury.[16]

> While a child may not have been physically injured as a consequence of negligence...he may have been emotionally traumatised by his school experiences. Emotional trauma does not itself provide a basis for negligence action. However, if that emotional trauma results in some recognisable and diagnosable physical, mental or emotional illness, an essential element of the negligence action, namely 'actual damage' is established...The child who is traumatised by his school experiences to such an extent that he becomes physically or emotionally ill, as opposed to becoming merely unhappy or upset, may sue the Department, school authority or teachers if their negligence was the cause of this illness.[17]

In a recent book on Mental Retardation and the Law[18], the authors suggest that if positive injury of the kind I have mentioned can be established, attributable to an inappropriate placement of a child in a special school or classes resulting in the development of emotional illness, such a child might be able to sue for consequential damages. Cases of administrative error of this kind are in the border-land of current legal

developments in Australia. Should school authorities or educational authorities be liable for the injuries suffered by a child if that child were, through negligence and administrative blunder, wrongly classified, say, as mentally retarded? Should such a child be entitled to recover the cost of 'catch-up' remedial teaching? Should he be entitled to sue for the traumatising effect of such a mistake? Should he be entitled to sue for lost opportunities in life? In New York a boy was given an IQ test by a school-employed psychologist shortly after enrolment and scored near the top of the retarded range. He was put in a special class with the recommendation that his IQ be retested within 2 years. He never was retested. He was educated as retarded until he turned 18. At that age he was transferred to an occupational training centre. He was given an IQ test and was found to be of average or slightly above average intellegence. He sued for educational negligence. At the trial he won a verdict. However, the New York Court of Appeal reversed the lower Court's decision and dismissed his claim.[19]

If the Government owes the duty of care recently spelt out so positively and affirmatively by the High Court to guard physical welfare to pupils in school playgrounds, why should it stop there? There is no reason of principle why the negligence action should be confined to physical injuries. So long as the injuries can be clearly established and are consequential upon carelessness and are not merely vague and unmeasurable, why should the loss not be borne by those who have wrongly caused it? It is just not possible, either in legal theory or commonsense, to hold the line at liability for physical injury. If an administrative error causes injury, why should there be no legal remedy to compensate for the forseeable consequences?

Now, I realise that determining that a duty is owed, determining the scope of that duty, determining that the duty was breached, determining that it was the breach (and not laziness or foolishness on the part of the student) which caused the loss: all of these are difficult legal and evidentiary problems. But once you hold that there is liability for physical injury, it is impossible, consistent with logic and principle, to say that other injuries that can be proved are beyond legal redress. There may be practical, financial evidentiary or administrative reasons for excluding compensation in such cases. But there can be no reason of logic or legal principle.

LIABILITY OF TEACHERS: INCOMPETENT TEACHING

There would be many teachers and even some educational authorities who would be prepared to concede compensatory remedies to pupils injured in a case such as the New York one I have mentioned. They would concede damages proved to flow from a frank administrative error. Much more controversial is the question of liability for negligent, lazy or incompetent teaching. This was a subject I raised in Whyalla.

In the United States, the liability of teachers for physical injury or administrative injury is now being pressed forward to a suggested new liability in respect of incompetent academic instruction. A number of suits have been brought alleging that a student's intellectual deficiencies are produced by so-called 'educational negligence' in the school system. Two cases have been brought recently claiming educational negligence on this ground. In each case, the cause of action was rejected. However, sufficient was said by the judges to suggest that this may be a potential growth area. Legal commentary in the text books in the United States suggests that successful cases of this kind will be mounted.[20] The two cases can be briefly outlined:

* In one case, an 18 year-old high school graduate claimed that his school was negligent in that it failed to provide 'adequate instruction, guidance, counselling and so-called supervision in basic academic skills such as reading and writing'. He particularly alleged that the school failed to diagnose reading disability, assigned him to classes in which he could not read the textual material, promoted him with the knowledge that he had not acquired the skills necessary to comprehend subsequent course work and allowed him to graduate with only a 5th Grade reading ability. The State's education code required an 8th Grade level before graduation. The California Court of Appeal affirmed the trial court's decision to dismiss the claim for failure to state a cause of action known to the law.[21]

* In the second case, a high school graduate received failing grades in several subjects. A New York education statute requires a Board of Education to examine pupils not already in special classes who continuously fail. The school authorities did not attempt to examine this pupil. Nor did they diagnose his educational problem. After graduation, he claimed that he lacked basic reading and writing skills because of these failures. He found it necessary to seek private tuition. He claimed the cost of this extra tuition. The Court dismissed the claim.[22]

Both of these cases have features of administrative mistake and error. Yet each of them also complained about the level of teaching to meet established difficulties and compliance with duties imposed on educational authorities. Whilst teacher commentary on these cases in Australia have been sceptical about the value of the law intervening to provide remedies in such cases, American writers are increasingly pointing to the inadequate state of the present law. They point to the irony that teachers and schools are held to owe an acknowledged duty for <u>physical</u> care. Yet they are not held to owe a legally enforceable duty for the <u>intellectual</u> advancement of the child, despite the fact

case of Goss v. Lopez.[24] At issue was the temporary suspension by a public school principal of several Ohio students for alleged misconduct. A closely divided Supreme Court (5-4) ruled in favour of the students. The majority held that a deprivation of a legal entitlement was involved, namely entitlement to free public education. In requiring some form of 'due process' for students, the Court made a strong statement about the role of the law in public schools in the United States. The Court did not require a formal hearing, the rights of cross-examination or the rights of counsel. But it did require some form of notice, explanation of the evidence and an opportunity to the students be heard. Critics alleged that this was a significant step towards legalisation of authority relationships in public schools.[25]

We in Australia should not dismiss these United States developments as irrelevant to our legal system. Already in the Federal sphere, we have seen important general statutes for judicial review used in the educational contexts:

* In 1981 Mr. Allan Evans applied to the Federal Court of Australia for an order of review of a decision by the Board of Examiners of Tax Attorneys, informing him that he had failed 2 out of 3 subjects which he had presented as a candidate for admission as a tax attorney. The Board of Examiners filed a notice of objection to the competency of the court to entertain the matter. In issue was whether action of the Board was a 'decision' of an 'administrative character' made 'under an enactment' within the meaning of the Administrative Decisions (Judicial Review) Act 1977. Mr. Justice Fox overruled the challenge to competency. He held that the decision was made under the Patent Attorney Regulations and was of an administrative character. He therefore held that the beneficial Judicial Review Act, designed to make public officials more accountable to the community, did apply and that the court should therefore examine the case. This decision swept aside years of judicial determination that courts would not use the prerogative writs, injunctions or declarations to consider matters concerning examinations, even where conducted by public bodies established by statute.[26] The clear language of the new Federal Act required Mr. Justice Fox to hear the case. The fact that other courts in the past under different laws have not done so was beside the point.[27]

* In 1982, a professor of the Australian National University brought an action under the same Act seeking reasons for the termination of his appointment. Mr. Justice Ellicott in the Federal Court ordered the University to provide the reasons holding that the decision was of an administrative character and made, ultimately, under

that this intellectual advancement is the primary professional duty assumed by teachers and educationalists. Unless teachers are prepared to accept a self-image as mere 'child minders', responsible only for the physical wellbeing of children placed in their care, their professional claims to a responsibility for the mind and intellectual advancement of the child may have consequences for their legal liability where it can be proved that teachers and education administrators have not reached appropriate levels of skill and care in discharging their intellectual functions.

Though critics, in the United States and Australia have urged that it is better to find administrative solutions to educational failing, that the costs of litigation would be a drain on already hard-pressed funds and that lay judges may prove inflexible and old-fashioned in their views about educational standards, supporters contend that an occasional educational negligence suit (particularly if brought by the procedural device of a class action) might have a potent and beneficial effect in stimulating lethargic educational administrators. Furthermore, courtroom litigation could open questions of educational standards to critical lay scrutiny and promote public debate about educational issues in a forum that may be more open and rational than many presently available.

I do not predict that educational negligence cases will proliferate rapidly in Australia. But if American experience is any guide, it seems likely to me that we will see such actions brought in our courts. The decision of the High Court in Introvigne is a final, beneficial and authoritative statement of the liability of public schools for physical injury to their pupils. Whether there is a liability for damaging administrative error or harmful intellectual injury are questions that remain to be answered by the Australian legal system.

ADMINISTRATIVE LAW AND TEACHERS

In my closing remarks, I want to say something about administrative law remedies in the educational sphere. This too is well developed territory in the United States. Due process for students became a matter for scholarly concern with the publication in 1957 of an article in the Harvard Law Review. Professor Warren Seavey chastised the courts for failing to give suspended students what he called minimal procedural protection 'given to a pickpocket'.[23] In the way these things happen, a series of actions were then brought in the United States courts on behalf of students who had been disciplined or suspended. Most of them are not of specific relevance to us in Australia because they depend very much on the United States constitutional guarantee of 'due process'. There is no such specific constitutional guarantee in Australia, at least at this stage. By 1975, the matter had reached the Supreme Court of the United States in the

the Australian National University Act 1946.[28] On appeal, the Full Court of the Federal Court reversed this decision, holding a determination was made under the contract of service not 'under an enactment'.[29]

These cases are admittedly under a new and special Federal statute confined to discretionary decisions of Commonwealth officers under Federal Law. But the Federal Judicial Review Act is probably the forerunner of other developments, statutory and common law, throughout Australia which will encourage a greater willingness in our courts to scrutinise administrative decisions. As more and more decisions concerning education (public and private) are made by public officials, it seems likely that this too will be a growth area for the law and legal regulation. We should be warned by the more extreme developments in the United States, particularly in the administrative law area. Above all, lawyers should constantly remind themselves of the words of Grant Gillmore:

> The better the society is, the less law there will be. In Heaven, there will be no law and the lion will lie down with the lamb...The worse the society, the more law there will be. In Hell, there will be nothing but law, and due process will be meticulously observed.[30]

CONCLUSION

On the basis of this prediction, Australia is no Heaven. No doubt some teachers regard it as Paradise Lost. Every year our Parliaments, Federal and State, turn out more than a thousand statutes. In addition, there are regulations, by-laws, ordinances and a myriad of subordinate legislation governing us all.

In Australia, law flourishes. In a federation of many States, it could scarcely be otherwise. We are a lawyered society. This fact explains why it is unlikely that teachers and education authorities will escape the discipline of the law. It also explains why it is vital that the crusade should be maintained to bring law-related studies into the Australian classrooms. I commend this Conference for its interest in these topics. I warmly support what you are doing to bring the people's law to the people.

FOOTNOTES

1. Victoria, Institute of Secondary Education, Handbook, Secondary Curriculum, 135.

2. Details supplied in letter by Dr. F.G. Sharpe, Director of Studies, N.S.W. Department of Education to the author, 7 July 1982, 2.

3. Noted ibid, 3.

4. R. Tucker, 'Issues and Resources in Legal Studies: A South Australia Perspective', unpublished paper delivered to the Australian Commercial Education Teachers' Association Conference, Sydney, 1981, 2.

5. South Australia, Committee of Enquiry into Education in South Australia, Education and Change in South Australia, Final report, January 1982 (Dr. J.P. Keeves, Chairman, 125.

6. M.D. Kirby, 'Law Education and Technology', unpublished address to the Commercial Teachers' Association of South Australia, Legal Studies Curriculum Committee, Adelaide, 16 April 1982, 12 (C.31/82).

7. United States, National Law-Related Education Program, Colorado, Final Report, Phase II, Year 1, 3-4 (1981).

8. C.T. Ross, 'Two Bicentennials: Making the 1980's a Decade of Constitutional Literacy' 68 American Bar Association Journal 434 (1982).

9. ibid, 435, 438.

10. M.D. Kirby, 'Legal and Social Responsibilities of Teachers', unpublished address to the Education Centre for Whyalla and Region, 22 March 1982 (C.20/82).

11. A.E. Knott, K.E. Tranc, K.L. Middleton, Australian Schools and the Law, Uni. Qld. Press (2nd Ed); B. Boer and V. Gleeson, 'The Law and Education' Butterworths 1982.

12. (1982) 56 Australian Law Journal Reports 749.

13. See e.g. Education News, Vol 18 No 2, December 1982, 47.

14. R. v. Minister for Education; ex parte Conford (1962) 62 SR (N.S.W.) 20.

15. ibid.

16. S.C. Hayes and R. Hayes, Mental Retardation: Law, Policy and Administration, Law Book Company, 1982.

17. ibid.

18. ibid.

19. Hoffman v. Board of Education 49 NY 2d 121 (1979). In a 4-3 decision, the Court of Appeals held that the judiciary should not interfere in educational policy determinations except where 'extreme violations of public policy' occur.

20. See e.g. 'Educational Malpractice' 124 Uni.Pennsylvania Law Rev. 755 (1976); D.S. Tracy, 'Educational Negligence' 58 North Carolina L.Rev 561 (1980).

21. Peter W. Doe v. San Francisco Unified School District 131 Cal.Rptr. 863 (1976).

22. Donohue v. Copiague Union Free School District 408 NYS 2d 584, 585 (1977). Affd. 47 NY 2d 440 (1979).

23. W. Seavey, 'Dismissal of Students: "Due Process"', 70 Harvard L.Rev. 1406 (1957).

24. 419 US 565 (1975).

25. M.G. Yudof, 'Legalisation of Dispute Resolution, Distrust of Authority, and Organisational Theory: Implementing Due Process for Students in the Public Schools', 5 Wisconson L.Rev. 891 (1981).

26. See e.g. Ex parte Forster: re University of Sydney (1963) 63 SR (N.S.W.) 723; Thorne v. University of London [1966] 2 QB 237; (1966) 2 All ER 338 and de Smith, Judicial Review of Administrative Action, 4th Ed., 30, 504(n).

27. Fox, A.C.J. in Evans v. Friemann (1981) 35 Australian Law Reports 438.

28. Burns v. Australian National University (1982) 40 Australian Law Reports 707, Ellicott, J.

29. The Australian National University v. Burns (1982) 43 Australian Law Reports 25.

30. G. Gilmour, The Ages of American Law, 111 (1977), cited Yudof, 923.