GIPPSLAND SECONDARY REGIONAL COUNCIL

IN THE EDUCATION DEPARTMENT OF VICTORIA

MOE, VICTORIA, FRIDAY 27 MARCH 1981

1981 LEN FALK LECTURE

EDUCATION, THE LAW AND THE CHALLENGE OF CHANGE

The Hon. Mr. Justice M.D. Kirby *

March 1981

GIPPSLAND SECONDARY REGIONAL COUNCIL

IN THE EDUCATION DEPARTMENT OF VICTORIA

MOE, VICTORIA, FRIDAY 27 MARCH 1981

1981 LEN FALK LECTURE

EDUCATION, THE LAW AND THE CHALLENGE OF CHANGE

The Hon. Mr. Justice M.D. Kirby *

THE LEN FALK SERIES

This is the fourth lecture in a series named in honour of Leonard Alan Falk, Regional Director of Education in Gippsland since 1972. My predecessors have included His Excellency the Governor-General, Dr. Ken McKinnon, former Chairman of the Schools Commission and Dr. James Eedle, Permanent Head of the Department of Education in the Northern Territory. It is now an established annual event of a Region in which there are some 300 schools with about 3,000 teachers and 45,000 students. I am proud to make my contribution.

After the advent of government schools in Victoria, with tuition which was 'free, secular and compulsory', the Education Department of this State, in common with that of other States and Territories of Australia, followed a mode of administration which was strongly centralised. Great power and responsibility were reposed in the Director-General and other officers of the central administration. In 1972 Leonard Alan Falk was appointed to the experimental administrative and professional position of Regional Director of Education in Gippsland. Two other Regional Directors were appointed to the Regions centred on Ballarat and Bendigo. With great energy and vision, Mr. Falk and his colleagues promoted the idea of Regional level administration as a viable alternative means of providing effective administrative and professional leadership to the schools under their direction. In 1974, eight further Regional Directors were established, by this time encompassing the whole State of Victoria.

In 1979, in a further extension and natural development of regionalisation, the Victorian Minister of Education, Mr. Alan Hunt, initiated an important review of the administration of his department. A White Paper was published in 1980 concerning the structures for education in Victorian Government schools.[1] Can there be any doubt that the procedures of consultation and open public discussion involved in this consultative process are a most desirable development for Australia, where the administrative ethos, within education and elsewhere, has until recently been marked by traditions of profound secrecy?

To honour Mr. Falk, the secondary principals of the Gippsland Region initiated the lecture series in 1977. It is a high honour to pay to a serving colleague and superior, whose merits have been seen by fellow professionals during his lifetime and not, as so often happens in Australia, after he is safely out of the way: whether by retirement or something worse.

Leonard Falk is himself the product, as I am, of the government school system. He was educated at Terang Higher Elementary School and at Melbourne Teachers' College. He holds degrees within Melbourne and Monash Universities. Within school administration, until his appointment as Regional Director in 1972, he held, successively, headship of three large high schools, including two new high schools.

If you will forgive a personal reminiscence, I was educated through the State school system in New South Wales. Taken at the age of nine by a process of I.Q. tests, to an Opportunity School, I went thence to Fort Street High School. Fort Street has produced many of the leaders of our country, not least in the law: from Edmund Barton to H.V. Evatt, from Garfield Barwick to John Kerr, from Bertram Stephens to Neville Wran, it produced that special combination of intellectual excellence and mild to sometimes aggressive ambition, which is the special mark of many clever students not born with a silver spoon. I wonder how many of such famous men think back, as I often do, to the debt they owe to their teachers and to their schools? Great is the opportunity of the teacher to mould, develop and inspire those in his charge. I refer not only to the community's leaders, but also to those who go on to good citizenship in any walk of life. Like Rumpole of the Bailey, my period at school was replete with compulsory instruction in the treasures of our tongue. Though Kipling is not now much in vogue, he was surely right when he said of his teachers:

Therefore praise we famous men,
From whose bays we borrow,
They who set aside today,
All the joys of their today,
And by toil of their today,
Bought for us tomorrow.

Bless and praise we famous men,
Men of little showing,
For their work continueth,
And their work continueth,
Broad and deep continueth,
Great beyond their knowing.

Old hat? Maybe. Cliched phrases? Possibly. Lost Biblical allusions? Certainly. But let there be no doubt of the profound influence of teachers upon all of us, too infrequently acknowledged yet privately remembered, throughout life, to the end. I am sure that Len Falk will permit me, in honouring him, to honour also those who have served with and under him and those in a sister State whose work continues in my every day.

EDUCATION IN THE NEWS

Education threatens to overtake sex as the most newsworthy topic in Australian society. Nowadays, one can hardly open a newspaper, listen to the radio or watch serious programmes on television without having one pundit or another put forward his views of what is going wrong in education and what is needed to make it all right again.

First, take the group who see the solution of our education 'problem' as institutional. According to this group, one has only to devise a new structure and most of our difficulties will be removed. Thus in February 1981 a report on the attitudes of teachers in South Australia to education suggested a consensus for abolition of the school principal system and an open exchange between teachers of government and non-government schools.[2] The report was not an official one, though supported by funds provided by the Schools Commission in Canberra. It contemplated a system of school boards which would have the right to 'hire and fire' teachers, select teachers appropriate for particular jobs and respond to local community desires. Dr. John Bremer, writing in the Australian[3] urged the abolition of 'The Education System' in Australia because the 'system' has, according to Dr. Bremer, 'become too much of an end in itself':

> It may be arrogance or fear or limited intelligence or lack of imagination, but a large number of professional educators — teachers and administrators — cannot envisage education without the system they have come to know and serve. But there lies the heart of the problem. They serve The System. And their vision of what is good for students and for society is always in terms of The System.[4]

A report of the 1980 Conference run by the West Australian High School Principals' Association and the Education Department of that State titled 'Secondary Education in Western Australia: A Case for New Directions' urged a number of recommendations as the basis for educational renewal. Amongst them were:

- That the existing system of subjects and courses be replaced by one consisting of units of study.
- That the length of the school day be determined by the needs of the school.
- That research be undertaken to identify the under-achieving students.
- That the certificate under the authority of the Board of Secondary Education be issued to every student at the time of exit from the secondary system.
- That the process of secondary education be separated from the selection of candidates for tertiary study.[5]

No-one here will be ignorant of the fact that regionalisation, diminution or modification of the 'core curriculum' and changes to the established ways of doing the business of education, are contentious issues, provoking strong reactions, deeply felt. Mr. B.A. Santamaria, for example, pointing to the growing importance of school in a society in which nearly half of all married women are in the work force, has criticised what he sees as the 'disintegration of the structure of primary and secondary subjects' and their replacement by, what he calls, "mickey-mouse" substitutes:

> It is one thing to insist that university requirements should not dominate the syllabus for the majority of 15 and 16-year-olds who will never go to university. It is a totally different and fallacious conclusion to make that the justification for lack of intellectual rigour — compounded by the progressive disappearance of objective testing — in the subjects studied by those who do not go to university.[6]

A second group point to rationalisation of funding as the source of most problems. Today's press carry reports of the proposals of the Schools Commission and Tertiary Education Commission for the next three years. The Schools Commission is reported to have urged more funds, more diverse teaching philosophies, more open enrolments and more community say in running schools to stem the perceived fall in enrolments in State primary schools throughout Australia. A 9.6 per cent increase in funding for schools was urged for 1982. The Australian summed up its reaction:

> The Schools Commission obviously labors with the fact that there is no systematic government policy in education or for youth generally. Given the double system of schools, government and non-government, both supported by public money, there should be a common policy and financial base upon which to make decisions. ... Australia has no comprehensive, coherent education policy and these two reports only illustrate that fact. ...
> Australian, 27 March 1981.

A third group are those who feel that something fundamental has gone wrong with our teachers and that somehow we must provide correctives. One writer to the editor, with a somewhat heavy-handed Shakespearean allusion, recently asserted:

> It is little wonder that the generations which [government schools] are now producing appear to be illiterate, innumerate and amoral. The fault, dear reader, is not in our sons but in their teachers that they are underlings.[7]

There is no doubt that this view is now very much in fashion in some quarters. Another letter to another paper explained the suggested increase in the numbers of parents 'turning to private schools to secure an education for their children' as follows:

> Government schools have a captive market, since children are obliged to attend the school in their allotted district. Government schools therefore have no incentive to offer subjects and standards which are wanted by their clients (which is not to say that many government schools do not provide a high standard of education). However, the critical point is that, because of their captive market and because the Education Department bureaucrats and, in turn, the government, stand between teachers and their clients, there is not and cannot be any accountability by government schools to their clients. This is contrasted with private schools.[8]

One New South Wales professor of philosophy, Professor Lauchlan Chipman of the University of Wollongong, caused something of a stir recently by asserting that State Education Departments were actually lowering the teaching standards in government schools by retaining 'deadwood'. He claimed that this so-called 'deadwood' was being protected by powerful teacher unions who 'refused to countenance any change in the hiring and firing system':

> Tenured teachers in the secondary sector comprise most of the worst and few of the best of the Australian university graduates of the late 60s and early 70s. In their desperation to find teachers, Education Departments scraped the bottom of the barrel.[9]

Professor Chipman's arguments led him to urge filling of vacant teaching posts by advertisement, fixed appointments and suitable selection committees, including with the power to get rid of presently so called tenured 'deadwood' and to promote merit and achievement advancement:

> One of life's great mysteries is the power of teachers' unions. Disliked almost universally, they nonetheless are extremely successful in achieving their objectives. Teacher disobedience and indiscipline hardly raise a comment. Ministers who begin with public declarations of toughness inevitably cave in. ... The main functions of teachers' unions today is to resist external accountability — both in the educational and management levels.[10]

From England comes at least one suggested solution. Lord Perry, former Vice-Chancellor of the Open University, has predicted that robots will, in the future, probably teach children more successfully than humans presently do. He predicted that by as soon as the 1990s, teachers could be relegated to jobs as child minders, examiners or (the supreme insult) sports referees. The address was a serious presidential lecture to the North of England Education Conference in Carlisle. Lord Perry claimed that all available evidence suggested that children respond very positively to learning systems involving T.V. cassettes and other electronic media. He also said that it would be a better way ultimately of achieving greater equality of educational opportunity and a wider range of choice in the courses available.[11]

And if the organisational funding, professional, union and technological problems are not great enough, there is now a distinctly heated debate concerning the role of the school and teaching in the preparation of pupils for the personal relationships they will encounter in life. The Guidelines on Health and Human Relations for Victorian Schools accept the principle that schools have a responsibility for promoting health in both the individual and in the community and in providing appropriate education in health and human relations.[12] Even in other States, we have been made aware of the controversy which surrounds this development. Not only in the television media but also in the less fleeting print media, the commentators have had a field day. Mr. Santamaria again:

> There is no more obvious example of the consequences of the abandonment of the family role in education to the school than in what is being done in several Australian States with sex education, under the more euphonic and all-embracing title of health and human relations. ... If what you teach theoretically in the name of biology, is not merely the 'facts' of the normal biological relationship between man and woman in marriage — 'facts' which are by definition heterosexual — but also the 'facts' which relate to lesbianism, abortion, contraception, pre-marital sex; and if you state or merely allow it to be assumed by children, that these are all equally valid expressions of the sexual instinct and therefore equally valid options from which the child may freely choose, that is not to teach biology. It is to teach a new and quite deliberately anti-Christian morality under the pretext you are teaching biology.[13]

Mr. Santamaria claims that thousands of parents throughout Australia are resisting these courses at the price of vilification and opposition from the entire 'machinery of government in the form of anonymous bureaucrats of the Education Departments backed up by the powerful influence of teachers' unions'.[14] In the course of his criticism, he even mentions the subject of law reform:

> It is sometimes alleged that the destruction of the principle of authority in institutions from the family upwards; the use of the law and changes in the law to transform the consciousness of the professions as well as general community attitudes as to what constitutes normality in society; and the use of the school to educate the child in the moral legitimacy of the abnormal biological practices which the law now permits, and thus to transfer into immature minds the victories of the humanist revolution — that all of this is the result of conspiracy.[15]

On the other hand, newspaper editorials[16] and serious letters to the press state the opposing argument:

> Human relations should be the part of every school curriculum and every parent-teacher annual programme. [We are] aware of the vast human and financial cost of drug addiction, community violence and family disorganisation. We are also aware that the majority of stress disorders arise from stressed relationships and require helpful relationships for their rehabilitation. Human relationships are the most important experiences of childhood and adult years. But we take them for granted, rely on luck and hit and miss. We could learn better ways of coping with conflict, frustration and stress; how to control our anxieties and curb hostility; adapt to change and express compassion and care.[17]

YOUNG AUSTRALIANS IN HARD TIMES

To all of these dilemmas and controversies in education today must be added the special problems which young people nowadays face and which their predecessors, at least over recent generations, did not face. The report of the Committee of Inquiry into Technological Change in Australia (the Myers Committee) reported in July 1980:

> Many of the unemployed persons in Australia are under 25 years of age and significant numbers are school leavers who have been unable to obtain work on completing their education. The committee recognises that a growing economy and expanding employment opportunities are particularly important for the new entrants to the labour force. Technological change is a key factor in achieving this needed economic growth.[18]

One hears loose talk in some quarters that many young people deliberately opt for unemployment. I am sure that the Myers Committee was right when it concluded:

> In the case of unemployed persons, the committee believes that most would prefer to obtain their share of the national wealth by being in paid employment. Although unemployment benefits are paid and are increased from time to time, the evidence suggests that the absence of employment opportunities is in itself of fundamental concern to the individual unemployed person.[19]

Describing the disadvantages which young people face in entering the labour force in a time of recession, Professor Myers and his colleagues concluded that young people often faced special difficulties in a time of rapid technological change. Though they are frequently able to adapt more quickly, excessive vocational specialisation in training may all too frequently be overtaken by new technology.[20] A lesson Myers invites us to draw is that educationalists in schools should concentrate more attention on technologically-oriented secondary education and less attention on highly specialised vocational training.[21] Though it is fashionable to suggest that unemployment may be cured by education which is precisely directed at manpower needs of today, the danger is that the youth of today will be locked into specialties which are all too soon overtaken by rapidly changing technology. Many educationalists, both at the top level and at the workface, have repeated these warnings. The Governor-General, a predecessor in this series and a most distinguished educationalist, in an address on education at Sydney University last September, reminded the audience of the danger of placing the school system in a straightjacket. Citing Professor Karmel's observations, he warned of the 'risks associated with exercises in fine-tuned manpower planning':

> It may be that this is of more direct relevance to the operations and activities of post-school institutions though [Professor Karmel] sees it generally as wrong and ill-advised to sacrifice long-term advantages of broad education to short-term requirements of employers which are 'based on a known past rather than on an unknown future' and while in some courses of study leading to the attainment of specific skills which are provided at high cost, there is very good reason for attending to manpower considerations, there are many areas in which its use is doubtful. There is immediately a technological or practical reason. It is said that a powerful inhibiter of the new technology is the speed with which skills can change in response to changes in their relative demand. In the past a skill acquired at the beginning of a working life might keep its relevance throughout that period. On some estimates industrial structures and processes of production will change so rapidly in the future that the life expectancy of a skill may be only ten years or less. That is an argument for flexibility, for a more general education rather than one defined in narrowly vocational terms. The goal is to provide the best assurance of adaptability to change. ...[22]

A survey completed recently for the State Inquiry into Teacher Education in New South Wales indicated that teachers in that State agreed with this perspective. Education in practical skills directly related to the job market was regarded as the first essential to the school curriculum by only 8% of the 3,195 teachers questioned. The priority for most teachers (40%) was helping pupils to develop in their own way by teaching self-understanding and self-confidence. 27% saw their priority as teaching moral values and behaviour. Next on the list came academic advancement (15%). Acquiring practical skills and tuition in understanding the nature and complexities of modern society each rated 8%.[23]

There is no doubt that this is another matter upon which there will be divisions in society. Some of our political leaders, and certainly many industrialists and employer groups, would profoundly disagree with the priorities assigned by the surveyed teachers in NSW. Some even see the education system as a cause of youth unemployment because schools do not adequately teach practical work skills. Some of the supporters of school responsibility and regionalisation claim that in decentralisation there is a greater chance of responsiveness to the demands of the community for work skill orientation. It will be important that the community should be alerted to the countervailing views that our time of technological change requires greater adaptability than was the case heretofore. Whilst paying proper deference to numeracy and literacy, there is a need to ensure, as it seems to me, that the educational system of the future devotes adequate attention to preparing the youth of today for the world of tomorrow: a society of rapid change.

FOUR FORCES FOR CHANGE

What are the chief forces for change in our society? The dispassionate observer can discern at least four forces that are at work in Western communities today, including Australia, changing the society into which young people emerge from their education. It will be important to keep these forces in mind for they affect the environment for which education is preparing the young. I would identify the following four main themes:

- the growing importance of the role of government in the lives of all of us;
- the growing importance of big business and the decisions made in large corporations, affecting our lives;
- the changing moral values and social attitudes which are, in part, the product of an education system which is 'free, secular and compulsory'; and
- above all, the force of science and technology, the most dynamic factor in the equation and the one which most obviously imposes the necessities of transition on us.

The Growth and Importance of Government. Take, first, big government. The common law of England, which is the basis of the Australian legal system, stretches for at least 800 years. But during the first 750 years, the role of government was distinctly circumscribed. Naturally enough, the legal remedies that were developed for the citizen reflected this limited conception of the functions of government. It is only really in this century, and indeed in recent decades, that the public sector has come to assume such a significant role in the daily life of virtually every one. Perceiving this development the Lord Chief Justice of England, Lord Hewart in 1930 sounded a warning in his book 'The New Despotism'. He alerted lawyers and law makers to the dangers for the individual (and for the rule of law) of large numbers of bureaucrats, working without effective judicial supervision and within very wide discretions conferred in ample terms by legislation, frequently designed by themselves.

It is only in the last decade that, in Australia, Lord Hewart's warning has been answered. One of the happiest developments of law reform in our country has occurred at a Federal level and under successive governments of different political persuasion. It has produced what has been called 'the new administrative law'.[24] An Ombudsman has been established. An Administrative Appeals Tribunal has been set up, headed by judges, to review, on the merits, certain Commonwealth administrative decisions. An Administrative Review Council has been established to develop new administrative remedies in a systematic way. An important measure has been passed through Parliament and was proclaimed to commence on 1 October 1980. It confers on people in Australia a legal right to have reasons given to them for discretionary decisions made by Commonwealth public servants affecting them.[25] In the place of bland uncommunicative decisions, the individual will be entitled to a reasoned response. So far as I am aware, only in the Federal Republic of Germany and in Israel is there similar legislation.

Freedom of information legislation is also to be reintroduced into Federal Parliament very shortly. Though there has been criticism concerning the areas of exemption from the right of access, critics should not lose sight of the fundamental change which the legislation envisages. In place of the basic rule of secrecy of bureaucratic procedures, will be a basic rule of openness and the right of access. Refusals of access will generally be the subject of independent review in the Administrative Appeals Tribunal. Privacy legislation, to be proposed by the Law Reform Commission, and a basic code of fair administrative procedures will complete this 'new administrative law'. Although these developments have so far been limited to the Commonwealth's sphere, moves are afoot for similar changes in the States. The role of government and its employees has increased and is likely to continue to increase. The law has begun the long haul of responding to this phenomenon: providing individuals with accessible, low key effective remedies of review and reconsideration by external and independent machinery.

The skill and dedication of the public officer is submitted to the civilising test of 'fairness' on the part of generalists, upholding the rights of the individual.

Growth and Change in Business. The second force for change in the law is the changing face of business. The mass production of goods and services gathered momentum from the automobile industry and is now an important feature of our society. Yet many of our laws reflect the business methods of earlier times and fail to reflect the realities of the mass consumer market of today. The common law of contract assumed an equal bargaining position between the vendor on the one hand and the purchaser on the other. It is precisely to meet the reality, which is different, that we now find most jurisdictions in Australia and elsewhere have enacted consumer protection legislation to ensure that basic conditions are met in fairness to the consumer.

Several of the tasks before the Australian Law Reform Commission illustrate the way in which it is necessary to bring laws developed in earlier times into harmony with the commercial realities of today. Our project on consumer indebtedness led to a report which suggests a new approach to the problems of small but honest consumer debtors. Our debt recovery laws pre-date the enormous expansion of consumer credit that followed the second World War. Accordingly, they are imbued with a philosophy that debt is never innocent and should be dealt with individually. The Commission's report[26] faced up to the reality of the modern extension of credit, the reliance nowadays of creditors upon a credit reference system to protect them and the need to take individual debt not necessarily as a sign of moral culpability but often as an instance of incompetence in coping with the credit community of today. Procedures for credit counselling, aggregation of debts and systems of regular repayment of debts were suggested in the place of present procedures of court action and bankruptcy.

Likewise, the Commission's project on insurance seeks to adjust the law to an age of mass consumer insurance. The law governing the relations between insurer and insured was basically developed in the 18th Century, long before mass produced insurance polices were sold by radio and television to people of varying understanding and little inclination to read the policy terms. The imposition upon consumer insurance of the obligation worked out in an earlier time for different kinds of transactions is scarcely appropriate. Yet unless there is reform of the law, that is what will continue to be the case.[27]

The Australian Law Reform Commission has also been asked to report on class actions: a legal procedure which has been developed in the United States. Class actions permit consumers and others to aggregate their claims into one big action, making litigation between the consumer and big business a more equal proposition than may be the case in an isolated individual claim.[28] These are just a few instances of the way in which proposals are being made to adjust the legal system to the commercial realities of today and to modern procedures for the administration of justice.

Changing Social and Moral Perceptions. The third force for change is more difficult to describe. As I have said, it is probably itself bound up in higher levels of education, longer school retention and improved methods of the distribution of information by radio, television and the printed word. I refer to the changing moral and social attitudes which are such a feature of our time. There are many forces at work. In the space of a few decades we have moved from official acceptance of 'White Australia' to official (and increasing community) support for a more multi-cultural society. From forbidding the use of languages other than English in broadcasts we have moved to a multi-cultural television network. The last decade saw the rise of the women's movement, of anti-discrimination boards, of efforts to eradicate suggested 'sexual oppression' and courses at school in understanding of sexuality. There has been talk of the rights of the child. This year is the Year of Disabled Persons. I predict that the growing numbers of the aging in our society will lead to new emphasis upon the rights of the old. Successive governments have carried forward policies to reverse decades of neglect and worse in relation to our Aboriginals. These are just a few of the recent social changes.

For some citizens, especially those of the older generation, it must all seem as if the world has been turned on its head. Not two decades ago, it was the received cultural wisdom that Australia was a man's country of decidedly British values. Others could like it or lump it. Everyone had to comply with the accepted norm and be assimilated and integrated into it. Now the despised and disadvantaged groups of the recent past are listened to earnestly with growing community appreciation: ethnic groups, women, homosexuals, paraplegics and the disabled, the mentally ill and retarded, Aboriginals, the old. Football and cricket still draw record crowds. But so now do our theatres, our films and the arts generally. Puritan morality has given way to open advertisement of massage parlours. Nude beaches flourish in at least some of the warmer States.

These changes cannot come about without affecting the law and its institutions. People, including people in high places, begin to ask why there are so few women in the judiciary of Australia?[29] Why various laws still discriminate against migrant newcomers?[30] Why the criminal law contines to enforce, in the so called 'victimless crimes', attitudes to morality which are not now held by the great majority of citizens. In no other Commonwealth Act has the changing community morality been more vividly reflected than in the Family Law Act 1975. That Act substantially replaced the notion of fault as the basis for the disollution of marriage, replacing it by a new test: the irretrievable breakdown of the marriage.

As in education, so in law. In a time of transition, it is uncomfortable for those who cling to the values and certainties of the past. There are many sincere citizens who bemoan the radical changes, some of which I have touched on. No recent piece of Federal legislation has been so beset by heartfelt controversy than the Family Law Act itself. Yet if community attitudes and standards are changing, the endeavour through the law, to enforce the attitudes and standards of an earlier time is bound, in the end, to fail, unless it has substantial support or at least acquiescence in the community. Laws of earlier times applying on a social base that has shifted tend not to uphold past morality but simply to bring contempt for the law and its institutions. They breed cynicism and even corruption which undermines the rule of law itself. The moral of this tale is that, whilst the law must necessarily tread cautiously, its rules and their enforcement should never be too far distant from current perceptions of right and wrong. When those perceptions are changing rapidly, as they are just now, it is a difficult time for law makers and those who advise them. In a time of transition, it is also a difficult time both for those who support reform of the law and those would cling to old ways. The attitudes of each must be understood and respected.

Dynamic Science and Technology. The fourth force for change in the law is equally at work in education. I refer to the dynamic of science and technology. The birth last year in Melbourne of Candice Read and the birth earlier this month of the child Victoria: two children of this community fertilised in vitro herald remarkable developments in biology which will pose dilemmas for society and the law. Cloning, which has been developed in plants and more recently in prize bulls is now, we are told, a possibility for human beings. In the United States the use of a host or surrogate mother to bear the child of another has occurred. Human tissue transplantation is occurring regularly in all parts of Australia, as scientists overcome the body's natural immune rejection of organs and tissues from other persons.

The developments of computerisation, particularly as linked to telecommunications, present many problems for society, including its educators. By a remarkable combination of photo reduction techniques, dazzling amounts of information can now be included in the circuit of a tiny microchip. The computerised society may reduce the needs of employment, increase the vulnerability of society, magnify our reliance on overseas data banks and endanger the privacy of individuals.

These and other developments raise questions which the law of the future will have to answer on behalf of society. Should human cloning be permitted and if so under what conditions? Is it acceptable to contemplate genetic manipulation, consciously disturbing the random procedures that have occurred since the beginning of time? In the case of artificial insemination by a donor other than a husband, what rules should govern the discovery of the identity of the donor, if this is ever to be permitted? What rules should govern the passing of property and how can we prevent accidental incest in a world of unidentified donors? Should we permit the storage of sensitive personal data about Australians in overseas data banks and if so under what conditions? What requirement should be imposed for the supply of data in one computer to another? Is the systematic matching of computer tapes a permissible check against fraud or a new form of general search warrant which should be submitted to judicial pre-conditions? Under what circumstances are we prepared to tolerate telephone tapping to combat crime? Is junk mail a passing nuisance or unacceptable invasion of privacy?

Almost every task given by successive Attorneys-General to the Australian Law Reform Commission raises an issue about the impact of science and technology on the law. In our project on criminal investigation, we had to look to ways in which police procedures could have grafted onto them the advantages and disciplines of new scientific advances.[31] In our report on human tissue transplanation, we had to work out the rules that should govern the taking or organs from one person for the benefit of another.[32] We also had to answer the question of how death is to be defined in modern terms. Should positive donation be required or can we legally impute a general community willingness to donate organs after death. Our project on defamation law required us to face the realities of defamation today: no longer an insult hurled over the back fence but now a hurt that may be carried to the four corners of the country.[33] Our reference on privacy requires us to examine the ways in which we can preserve respect for individual privacy whilst taking advantage of the computerisation of society.[24] Even our most recent project on reform of the law of evidence requires us to re-examine some of the accepted rules of evidence against modern psychological and other studies which suggest that many of the accepted tenets of the law do not stand up to empirical scrutiny.

There is no doubt that computing will affect the education and future curricula. Indeed the advent of the new information science should be seen in the same way as the introduction of electricity: it will be permeate almost every aspect of life. Its impact will not be confined to factory workers. None of the professions will be exempt. In the same way as pocket calculators took over from mathematical tables and slide rules in the 1970s, so pocket instructors will come upon the teaching scene in the 1980s: particularly in such disciplines as languages and the physical sciences.[35]

CHILDREN AND LAW REFORM

A number of the projects of the Australian Law Reform Commission have required us to look specifically at the law as it affects children. Thus, in our second report on Criminal Investigation[36] the Commission examined the particular problems which arise in the interrogation of children and young persons. Proposals were advanced for the security of investigations involving young accused, including the presence of a parent, relative, friend, lawyer, welfare officer or other responsible person.[37] The proposal was accepted by the Commonwealth Government in the Criminal Investigation Bill 1977.[38] Although that Bill has lapsed, the Attorney-General, Senator Durack, has indicated that it will be reintroduced in a revised form. It would govern only the activities of Federal Police. However most police forces, Commonwealth and State, recognise the need for special care in dealings with suspects who are young.[39]

In the Commission's report on Human Tissue Transplants[40], now adopted in the law of three jurisdictions of Australia and recommended for adoption in Victoria, one issue arose which divided the Commission. It related to the question of whether the law should ever countenance the donation of organs and tissues by legal minors, in the case of non-regenerative vital organs such as a kidney. A majority of the Commission proposed that this should be permitted within a family situation, provided certain safeguards, including judicial scrutiny, were observed. A minority of Commissioners (Sir Zelman Cowen and Sir Gerard Brennan, now of the High Court of Australia) dissented. Legislation based on the Commission's report has reflected the varying viewpoints of the majority and minority view.

The Commission's recent report, Sentencing of Federal Offenders[41] called to notice the special problems of punishing offences by young adults, including the problems of those many offenders who become caught up in the criminal justice system at an early age and find it difficult to escape.[42]

One present task before the Commission upon which it will next report relates to the child welfare laws of the Australian Capital Territory. That task requires the Commission to examine a whole range of subjects which have been lively items of contention in Victoria and indeed all States of Australia. They include:

. The differentiation in the treatment of young offenders, on the one hand, and children in need of care, such as neglected children or uncontollable children, on the other.

. The definition of the age of criminal responsibility in children.

. Whether the new Family Court of Australia should have any functions in relation to dealing with children in need of care, to take them out of the criminal courts.

. The definition and handling of cases of 'child abuse'.

. The issue of the compulsory reporting of suspected cases of child abuse, including by teachers and other school officers.[43]

. The issue of institutional abuse and the question of the survival of corporal punishment in schools.

. The regulation and supervision of day care services, whose importance becomes more manifest in a society of working mothers in impersonal urban communities.[44]

PRIVACY AND SCHOOL RECORDS

No project has required a clearer understanding of school administration than that which deals with the provision of new federal laws for the protection of privacy in Australia. The issues that are raised for resolution in that inquiry manifest every one of the forces for change which I have identified. The growth of government is reflected in the growing powers of entry, search and seizure given to increasing numbers of government officials and the growing bulk of government information systems with data upon all members of society. The changing face of business is seen in the new business practices, many of which are more intrusive than in times gone by, including door-to-door sales and direct marketing. Changing moral and social values can be seen in the greater awareness of the importance of privacy as a human value and in the recognition of the inability of present laws adequately to protect privacy.

The dynamic of science and technology is illustrated by the listening device, the long-distance surveillance camera, satellite spying and above all, the capacity of the computer to develop data profiles on all individuals, often on the basis of information provided for extraneous purposes.

In the course of our inquiry we have looked at a number of special information systems. One subject of particular inquiry has been educational records. For constitutional reasons we have concentrated on the records of the educational relationship in the Australian Capital Territory. However, in broad principle the same problems arise in educational records, wherever they are kept in Australia: Federal or State, public or private schools, centralised or 'desk drawer' notes.

Unlike most other records containing personal information (such as those relating to taxation, employment, social security and so on) educational records tend to be created during an individual's earliest formative years. They generally contain sensitive evaluative information concerning not only the individual's academic performance but also his personal qualities. They have the capacity often to affect the child's progress for the rest of his life: whether by limiting opportunities for further education and career choice, or by otherwise labelling him. Generally, this information is unknown to the student or his parents. Generally it is unavailable and almost without exception, the law at present provides no enforceable right of access.

In all probability, educational records are the most universal of detailed personal records of Australian society. Most people in Australia have attended, do attend or will attend an educational institution. Adult migrants visitors, some mentally handicapped people and some traditional Aborigines are virtually the only exceptions. In addition to the universality and sensitivity of educational records, their creation and maintenance is largely compulsory, though educational institutions are usually allowed considerable autonomy over their internal processes including record keeping. As a result, highly sensitive information may be collected and stored about a student. The dangers which may arise from this collection and storage may be increased by the fact that the subjects of educational records are usually unable to protect themselves against unfairness or even plain error in their content. In part, this is because of the limited understanding, vulnerability or immaturity of the student. In the case of older students, it may be the result of the feeling that any effort to assert a claim to see a record may jeopardise the student's chance of a favourable evaluation and brand him as a troublemaker.[45]

Most schools in Australia keep student records cards which, at this stage, are generally not computerised, but plainly, shortly, will be. Often a separate confidential record is kept including scores on I.Q. tests and like evaluative material. Medical records are generally kept separately. Access is a privilege. If permitted at all, it will generally be confined to a parent and then to non-confidential records. Use within the school is confined to the 'need to know' basis. Practices vary in relation to maintenance of records but frequently they are destroyed after an interval of years. Problems are recognised to arise concerning official claims for access to school information and requests for information by employers or by others seeking the whereabouts of children, for example in a custody dispute.

In the United States, major changes to the law governing access to educational records occurred as a result of the 'Buckley' Amendment to the General Educational Provisions Act 1974. The incentive for the amendment arose from concerns over the increasing computerisation of educational records[46] and perceived invasions of family privacy as a result of psychological and attitude testing and experiments in behaviour modification of children.[47] Anxiety in the United States was compounded by the revelation that many education record keepers had disclosed information to the C.I.A. and F.B.I. agents, juvenile courts and health departments, whilst in 90% of cases, completely denying parent and student access to the very same records.[48] The Buckley Amendment, as it originated on the floor of the Senate, was enacted without national debate or public hearing. After its passage through the Senate, there was a concerted effort by educators and parent and student groups to draft a revision titled 'Family Educational Rights and Privacy Act'. However, the amendment has been the subject of continuing controversy. Both administrators and affected parties remain unsure of the proper interpretation of the Act.[49] Objections are also voiced to the fact that the Act, although originally proposed to deal with problems in the primary and secondary schools, is extended to include tertiary education as well.

The United States Act applies to any school receiving federal funding through the U.S. Office of Education. It establishes minimum federal standards of privacy for educational records in the United States. Within these minimum standards, educational institutions are permitted considerable latitude in establishing procedures and formulating policies to implement the rights granted by it. The Act provides broad parent and student rights to access to student records, combined with strict disclosure restrictions. It does not control the collection of information. The emphasis is on self-regulation. Privacy infringements are to be monitored as a result of parent or student complaint. The Act requires any educational agency or institution receiving federal funds to make educational records available for inspection and review. Access is granted exclusively to parents or 'eligible' students i.e. those who are 18 years of age or attending a post-secondary institution.[50]

Certain categories of information are exempt from access, including 'desk drawer' notes, on campus law enforcement agencies' records and employer and employee records.[51] Other categories of information require indirect access, for example medical records of treatment by physicians, psychologists and psychiatrists.[52] If requested, an opportunity must be provided for a hearing to challenge the accuracy and content of information on file. No disclosure external to the institution is permitted without the written consent of the parent or eligible student.[53] This limitation is subject to certain exceptions, including directory information, school officials with a 'legitimate educational interest', officials of schools to which the data subject transfers, authorised representatives of educational authorities, financial aid authorities, educational research and development agencies, accrediting organisations, parents of a dependent student and 'appropriate persons' in emergency situations. Information may also be disclosed pursuant to a subpoena, subject to the duty to notify the parent and eligible student in advance of compliance with the subpoena.[54] To enable a check against unauthorised disclosure contrary to the Act, it is also required that the record keeper should maintain a log of disclosures. The only sanction under the Act is the withdrawal of federal funding. This is because the United States Congress does not have the constitutional power directly to regulate the activities of schools and universities. A similar inhibition exists in relation to the powers of the Federal Parliament in Australia outside the Territories.

Should we in Australia go down the same track in relation to rights of student and parent access to educational records? Many objections have been received by the Australian Law Reform Commission in the course of its inquiry from school and university authorities. It is asserted that the right of access will inhibit the frank recording of assessments and opinions, confining school records to undisputed factual data or bland, enigmatic, cryptic comments. It is asserted that such attenuated records will deprive educators of the future of the evaluative comment of educators of the past. It is feared that opinions and references about students and ex-students will depend on perishable recollection or telephone confidences rather than permanent or semi-permanent records.

On the other hand, supporters of the American legislation point to the pervasiveness of educational records, their importance in moulding attitudes to children and their significance, at the crossroads, when the career prospects of the child may be in question. Especially as external examinations come to play a lesser part in school advancement and teacher evaluation becomes more important, it is feared that secret opinions, possibly sometimes based on false, out-of-date or unfair information, may determine the entire future of a child.

In these circumstances, supporters of the enforceable right of access contend that the best person to protect the individual is himself, or in the case of a person of tender years, his parents. The right of access is the common principle adopted in the privacy laws of North America or Western Europe for the protection of the individual in the computerised information systems of the future. If it is the general common protection, the question is posed: what is so special about educational records that the child or his parent may not have access to them and a right of challenge, correction, annotation and, where appropriate, deletion? After all, the data profile is the data profile of the subject and it is his life that is principally affected by decisions made on the basis of the file. Furthermore, as education and other personal records are increasingly computerised, the risk of haemmorhage of personal data and of retention and of the use of data for composite personal profiles requires resolute action by the law to defend the individual's zone of privacy.

If an enforceable right of access is conferred by law, it is necessary to define its limits and the machinery for its enforcement. In the course of its public hearings on privacy protection, the Law Reform Commission received many submissions directed at proposals concerning rights of parental access to children's medical and educational records. At what stage the child acquires an individuality and privacy of his own which the law should protect even as against a parent or guardian is an issue only raised when one begins to take seriously the application of the principle of access to educational, medical and other confidences of the child. The strong passions that were generated in this debate reflect some of the deep convictions and firmly held opinions that mark the debate concerning education generally.

CONCLUSIONS

In the space of an hour it is not possible to solve these issues. But one thing is clear, they must not be determined by administrators in a back room. The debate itself is a healthy phenomenon. However uncomfortable, it marks the growing maturity of the Australian community. Public controversy about fundamental issues should not be mistaken for indecision and weakness. It is the special mark of an open society, struggling through democratic processes to determine its own future, and the future of the generations yet to come.

If I can say so, I admire and applaud the way in which educational authorities everywhere in Australia, but perhaps especially in Victoria, are enlisting public discussion and community debate in the process of change. We in the Law Reform Commission are committed to the same goal. The period of change through which we are living is an uncomfortable time, not least for educators and lawyers. But the change will not be stemmed by nostalgic harking back to days of yore. We must be bold enough to face the changes and to acknowledge their signficance for our society, for education and for the law. Our representatives and our elected governments, and those who serve them, must then be encouraged to make decisions necessary to adjust our institutions to the challenge of change. Otherwise education and the law will certainly go the way of the Brontosaurus. And that path would be even more perilous and uncomfortable than facing the necessities of adaptation and change.

Regionalism, decentralisation, school standards, a return to the three Rs, pruning the so-called 'deadwood' amongst teachers, education in personal relationships, the impact of technology: all of these are controversies worthy of community debate and, moreover, of debate within the profession of teaching. To all the other controversies I must add my own: the controversies generated by proposals for legal change. But just as education cannot stand still, so the law too must move with the times. The inevitable product of the community resulting from education that is universal, free secular and compulsory is a community with high expectations of education and high expectations of the law. We must make it our business to ensure that these high expectations are not disappointed.

FOOTNOTES

* Chairman of the Australian Law Reform Commission 1975—; Member of the Australian National Commission for UNESCO 1980—. Views expressed on educational matters are personal views only.

1. Victoria, White Paper on Strategies and Structures for Education in Victorian Government Schools, Melbourne, 1980.

2. Adelaide Advertiser, 5 February 1981, 2.

3. 19 January 1981, 7.

4. ibid.

5. The Australian, 9 February 1981, 7.

6. The Australian, 16 January 1981, 7.

7. Letter to the editor, the Australian, 19 January 1981, 6.

8. Letter to the editor (J.E. Patterson), The Age, 15 January 1981.

9. L. Chipman, in Quadrant (Jan. 1981), extracted Sydney Morning Herald, 22 January 1981, 3.

10. ibid.

11. Lord Perry, cited Adelaide Advertiser, 10 January 1981.

12. Victoria, Education Department, Health and Human Relations Education in Schools, 1980.

13. The Australian, 16 January 1981, 7.

14. ibid.

15. ibid.

16. The Age, 5 February 1981.

17. Dr. F.A. McNab, The Age, 12 February 1981, 12.

18. Committee of Inquiry into Technological Change in Australia, Report, Technology Change in Australia, AGPS (Vol. 1), 1980, 117 (para. 5.198).

19. ibid (para. 5.197).

20. ibid, 105 (Dpara. 5.127).

21. ibid, 90 (para. 5.48).

22. Sir Zelman Cowen, 'Some Thoughts on Education', Address to the Annual Function of Convocation, University of Sydney, 13 September 1981, mimeo, 17-18.

23. Sydney Morning Herald, 6 March 1981.

24. G.D.S. Taylor, 'The New Administrative Law', (1977) 51 Australian Law Journal, 804.

25. Administrative Decisions (Judicial Review) Act 1977 (Cwlth).

26. Australian Law Reform Commission, Insolvency: The Regular Payment of Debts (ALRC 6), AGPS, Canberra, 1977.

27. Australian Law Reform Commission, Discussion Paper No. 7, Insurance Contracts, 1978.

28. Australian Law Reform Commission, Discussion Paper No. 11, Access to the Courts - II Class Actions, 1979.

29. Mr. Justice Murphy in an address to the National Press Club, 21 May 1980.

30. Australian Law Reform Commission, Criminal Investigation (ALRC 2) (Interim Report), AGPS, Canberra, 1975. See esp. paras. 259ff (special problems of non-English speakers). See also M.D. Kirby, New Laws for New Australians, Sir Robert Garran Memorial Lecture, mimeo, 24 June 1980.

31. ALRC 2, above. Amongst suggestions made were sound recording of confessional evidence, telephone warrants for urgent searches and arrests and photography or video taping of identification procedures.

32. Australian Law Reform Commission, Human Tissue Transplants (ALRC 7), AGPS, Canberra, 1978.

33. Australian Law Reform Commission, Unfair Publication: Defamation and Privacy (ALRC 11), AGPS, Canberra, 1979.

34. Australian Law Reform Commission, Discussion Paper No. 14, Privacy and Personal Information, 1980.

35. M.D. Kirby, 'The New Technology and the Teaching of Legal Studies', mimeo, Melbourne, 10 July 1980. See also C. Evans, 'The Mighty Micro', 1979, Chapter 9; J.D. Morrison (ed), The Impact of Microprocessors on Industry, Education and Society, 1980.

36. ALRC 2, 1975 (Interim).

37. ibid, 127 (para. 266).

38. Cl.28.

39. See Chief Commissioner of Victoria Police, Standing Orders 644(2) in ALRC 2, 126.

40. ALRC 7, 1977.

41. ALRC 15, 1980.

42. See e.g. R. v. Davis and Jones, [1977] 1 Crim LJ 49 and R. v. M. (a minor), [1977] 1 Crim LJ 160.

43. Australian Law Reform Commission, Discussion Paper No. 2, Child Welfare: Children in Trouble, 1979.

44. ibid, Discussion Paper No. 12, Child Welfare: Child Abuse and Day Care, 1980.

45. United States, Report of the Privacy Protection Study Commission, Personal Privacy in an Information Society, 1977, 410.

46. Protecting the Privacy of School Children and Their Families Through the Financial Educational Rights and Privacy Act of 1974, 14 Journal of Family Law, 255 (1975-6). Florida has a centralised computer-based record system covering its entire high school system. Similar systems are being planned for Iowa and Hawaii and other States.

47. Meriken v. Cressman, 364 F.Supp. 913, 916. In this case, a student was requested to answer questions such as 'whether one or both parents "hugged and kissed me goodnight when I was small", "tell me how much they loved me", "make me feel unloved ...'.

48. Divoky, 'Cumulative Records, Assault on Privacy', 22 Learning, 18 (1973). In a survey undertaken in 1969 by the Russell Sage Foundation, 50% of record keepers surveyed disclosed educational records, whilst only 10% gave parents or students access.

49. US Privacy Report, 413, 416-7.

50. 20 USC, para. 1232g(d).

51. ibid, para. 1232g(a)(4)(B).

52. ibid, para. 1232g(a)(4)(B)(iv).

53. ibid, para. 1232g(b).

54. ibid, para. 1232g(b)(2)(B).