

316

EDUCATION CENTRE FOR WHYALLA AND REGION

ANNUAL DINNER, WHYALLA, SOUTH AUSTRALIA

MONDAY, 22 MARCH 1982, 7 P.M.

LEGAL AND SOCIAL RESPONSIBILITIES OF TEACHERS

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

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EDUCATION UNDER THE MICROSCOPE

Education, like law, is under the community's microscope. Virtually every State and Territory of Australia has produced or is producing a report on the problems of education, with suggestions for reform. In Victoria, the White Paper on Strategies and Structures for Education in Victorian Government Schools, issued in 1980, proposed important changes. In Tasmania, in 1981, a White Paper on Tasmanian Schools and Colleges, was issued by the then Minister for Education, Mr. Harry Holgate. In New South Wales, the report of the Select Committee of the Legislative Assembly upon the School Certificate, under the chairmanship of Mr. Brian McGowan MP, suggested important changes in secondary education. In South Australia, the Committee of Inquiry into Education has produced the Keeves report. This report acknowledges that there are:

issues that a Minister of Education might find hard to resolve since the Minister is likely to receive conflicting advice from different educational sectors. Moreover, pressure from interest groups frequently tends to prejudice the making of rational decisions.¹

Although this conclusion was condemned in a recent review of the report as 'the ultimate expression of the technocratic sensibility'², the Keeves report was certainly correct to point to a fact that is well known to everyone in the Education Centre for Whyalla and its region, and indeed to everyone in education in Australia today: schooling is something people feel strongly about. Because all, or nearly all, of us have been to school, we all tend to have a point of view about what should happen there. Because children are overwhelmingly involved in school education, people feel passionately about the subject. The McKinnon report, Schooling for 15 and 16 Year Olds, proposed a new view of education. The Schools Commission and the Tertiary Education Commission have produced their reports. Despite this proliferation of reporting, Dr. John Bremer has written in the Australian that:

we need a national inquiry into education. Not a select body of experts or dignitaries asking formal questions, but an all-out Australian effort to inquire into the meaning of education for us, a nationwide seminar, conducted by every means at our disposal.³

I must resist the temptation, pundit-like, to contribute my two-penneth worth to the education reform debate. My field of endeavour is the law. There is more than enough work in the area of law reform to keep me fully occupied, without intruding into the realm of education reform. However, I have been asked to speak on the legal and social responsibilities of teachers. It would be impossible to accept that topic, without putting the discussion into the context of some at least of the controversies surrounding education today. We live in a time of great change. The forces for change include the growth of the size and role of government, the changing face of business, changing moral and social attitudes and above all the dynamic of science and technology. In part, the product of free, secular and compulsory education is a society that is more questioning and better informed, including about the law and education. Your discipline and mine are under scrutiny as never before. It may be uncomfortable being peered at. But it is sure that the examination is going to continue into the foreseeable future. The Australian Law Reform Commission exists as a kind of permanent national inquiry into the law : suggesting (and even partly promoting) criticism and proposals for improvement. Before I venture into the territory I know best, I propose to say a few things about my perspectives, as a lawyer and as a citizen, about education today.

UNDEREDUCATED AUSTRALIA

There are a few statistics about education in Australia today that must be constantly repeated. They must be repeated until they produce action on the part of people in positions of responsibility for education, whether in government or in the educational bureaucracies. The first are the figures that show that we in Australia, comparatively, are falling seriously behind countries of like economic and political structure in respect of school retention. The Organisation for Economic Co-operation and Development (OECD) comprises the countries of the Western community : Western Europe, United States and Canada, Australia, New Zealand and Japan. We are frequently told of where we stand in the OECD inflation table. I want to call your attention to how we are faring in the OECD education table. We are faring poorly. Tables presented by the OECD, relating to the numbers of 17-year-olds who are in full-time education in a secondary school, contrast the position in Japan and the United States, on the one hand, and the position in Australia — which finds itself near the bottom of the league with countries such as Portugal and Turkey.

The figures I have are for 1976, the last year of available comparative statistics. But as I shall show, things have not changed for the better since then, so far as Australia is concerned. In that year, in Japan, 88.1% of the population aged 17 was in full-time secondary education. In the United States the figure was 78.2%. In Australia the figure was 31.2%. In other words, fewer than a third of our 17-year-olds were still at school, still receiving education, compared with almost three times that number in Japan and more than twice that number in the United States. Figures supplied to me by the Australian Bureau of Statistics suggest that since the 1976 figures, we have improved very little. Listen to them:

1976	31.2%
1977	32.0%
1978	32.1%
1979	31.7%

Back almost to where we started.

At 17 some Australians are already in tertiary education. But we can take no comfort from comparing the figures of 17-year-olds in tertiary as well as secondary education. They are:

Japan	88.1%
United States	84.6%
Australia	39.9%

By comparison to the United States and Japan, we in Australia are simply not holding our young people in the educational process. In a world of rapid change and a world of mature science and technology, these figures should be of the most profound concern to governments and educationalists at all levels. We should all be asking ourselves why should this be so? What should we do to improve Australia's relative position in respect of educational retention?

YOUTH UNEMPLOYMENT

During the time that I was being educated, in the 25 years following World War II, there was a very considerable expansion in enrolments in all forms of education in Australia. Not only was this due to demographic changes. It was also the result of a steady increase in participation of the Australian population in education. Since about 1972, this steady growth has levelled off. Particularly is this the case in respect of senior

grades of secondary schools and in progress to higher education generally. Although there have been increases in the participation of some sections (such as older people, particularly women, and technical and further education) the worrying statistic is the reduced participation of young people generally in higher education : secondary and tertiary.

The reason for this decline, after such a long period of steady growth, is not yet entirely clear. Professor Peter Karmel⁴ attributed the change in a recent address to two factors in particular, namely;

- . decline in the relative levels of student assistance available to sustain, especially young people from less affluent backgrounds, in ongoing education; and
- . student perceptions of the economic value of education when related to the state of the labour market and the urgencies of accepting employment in preference to continuing study.⁵

According to Professor Karmel, over the past 15 years full-time jobs for young people have become steadily fewer. Part-time jobs have increased. The young have been more and more pushed out of the regular labour market. A secondary market for casual part-time labour has developed in Australia. Unemployment among the young has increased significantly. Professor Karmel produced a sobering schedule of statistics to show the steady climb in the unemployment rate of persons aged 15 to 19 years between 1966 and 1981⁶:

TABLE⁷

UNEMPLOYMENT RATE OF PERSONS AGED 15 TO 19 YEARS, 1966 TO 1981

<u>August</u>	<u>Males</u>	<u>Females</u>
	%	%
1966	2.5	4.0
1971	3.2	4.3
1976	12.7	15.8
1981	11.2	17.1

Although the increase in unemployment among young people appears associated with the general level of unemployment in Australia and the decrease in economic growth, Professor Karmel's view is that long-term structural factors appear also to have been involved. Young unemployment is not evenly spread. It is greater among women, among minority groups, among the low achievers and among the poorly motivated. Professor Karmel reaches for a conclusion to be drawn from the coincidence in the decline of the

participation of young Australians in higher education, including in secondary schools, and the decline in full-time job opportunities, a trend which he thinks is likely to continue. His conclusion is of concern to all educationalists and of wider concern to all citizens. He says:

- . reduced participation of the young in higher education is also happening at a time of rapid technological change, which generally carries with it a requirement for superior education and training;
- . unemployment among the young has been growing and has been concentrated among certain disadvantaged groups; there is a risk that there will develop an 'educational under-class' whose activity is below what is socially acceptable.

Professor Karmel urges reform of secondary schools with emphasis upon the preparation for adult life rather than for particular vocational-oriented work. This is not a new call in Australia or elsewhere. But it has to be faced that it is an unpopular proposition. It is unpopular with parents and citizens, who call for more vocational education lest their children be unemployed. It is unpopular for governments who look for ready solutions to the problems of young unemployment and are sometimes inclined to blame the steadily rising number of young unemployed upon the alleged fact that young people today are just not literate and numerate enough to join the workforce.

EMPLOYMENT : GENERAL OR VOCATIONAL?

High technology promotes structural unemployment which leads in turn to calls for greater vocational emphasis in education. Yet the technology itself seems certain to diminish the economic needs to employ a growing proportion of people who presently do routine work. In point of logic, our education system should be addressing its attention to the new forms of education which will suit Australians of the future for a society in which there is less routine work and much more leisure. We have all of us heard the demand for the return to the three Rs. We have heard calls that education should 'return' to an emphasis upon preparing the young person to win against his fellows in the battle for scarce post-education jobs. Professor Sir Bruce Williams, in an analysis of technological employment and unemployment and its implications for education, made a plea for resistance to the calls for vocational emphasis in education:

That primary and secondary education should never be solely vocational is obvious from the extent of leisure and probable increases in it, from the prospective changes in the nature of work, from the importance of citizens who appreciate the virtues of honesty, integrity, tolerance and concern for others, and from the need for voters with a sufficient understanding of economic and political processes to make democracy work effectively. The view that there is a necessary dichotomy between liberal education and vocational education is false, but it is sufficiently widespread to retard sensible reforms.⁸

In short, Williams suggested that part of the Australian problem here is the endeavour to stamp on greater numbers, a system of education developed and suitable for a few traditional occupations and largely uninteresting and irrelevant to the preparation of most young people for the life they will lead into the 21st Century:

There is a need to establish a range of education programmes suited to the interests and needs of very different groups of students. I doubt whether we will find such a set of programmes until many administrators and teachers overcome some strong inhibitions which attach to vocational education.⁹

Although the citizen and political demands for vocational education are strong, the warnings of Karmel and Williams should be heeded by the Australian community. They lead, I believe, to these conclusions:

- . With steadily growing youth unemployment, we should be doing more in education, including secondary education, to keep young people at school. Consigning an ever-increasing percentage to the despondency of the dole queue is the most mindlessly unacceptable response to a trend which now looks to be settling in.
- . In increasing our school retention, we would be doing no more than catching up to our neighbours and competitors, especially the United States and Japan. How can we hope to compete in a world whose principal dynamic is science and technology, if we rank so low with Portugal and Turkey in the world league of school retention?
- . If we hope to retain people at school, we will not succeed in doing so by seeking to impose upon very large numbers who will never need it, the kind of classical education I received. When in the 1950s and 1960s there was a rapid expansion of secondary and higher education in Australia, unimaginatively, the courses developed in earlier times for the educated elite were simply largely expanded.

- . The world of science and technology -- the replacement of increasing amounts of routine work by the microchip -- will promote at once a need to give more thought to personal fulfilment from the creative use of leisure and generalist education so that pupils will not be locked into vocational disciplines that may themselves be overtaken and by-passed as a result of technological change. The Swiss watchmaking technicians are usually cited as a good example of how, with the advent of the digital watch, a whole ancient vocational technology was mortally damaged, many workers thrown out of employment and careful vocational preparation completely overtaken by sudden structural changes. Education must today beware of locking young people into highly specialist skills that are themselves vulnerable to technological change.
- . Finally, there are special groups in the community, including migrant groups and women, those forceably retired in middle years and the old, who need particular educational attention. Community demands for a return to the three Rs ring hollow in the ears of this group.

The above conclusions do not exclude a recognition of the need for better full-time vocational training in Australia. On the contrary, there is a clear need for specialist vocational training which is not being fulfilled. Professor L.A. Endersbee, Dean of the Monash University Faculty of Engineering, in the Hawken Address in October last year, expressed his views bluntly:

It is a sad fact that in Australia we have virtually always relied on immigration to supply a significant proportion of our technological workforce. ... Our domestic training programmes have lagged accordingly and now we do not have the training resources we need, especially of course for tradesmen. For tradesmen, the present situation is really quite scandalous. Unemployment in Australia now totals about 330,000 persons, including a high proportion of young people. In the 15 to 19-year age bracket, the number of young people seeking work is about 93,000. Immigration this year numbers 120,000 including a significant number of skilled people. The immigrants get jobs, and our own untrained, unskilled young people remain unemployed. Furthermore, because we do not have provision for adult apprenticeships, and full-time trade training, those of our young people who have missed out on trade training are denied it for life. Yet some of the immigrant tradesmen have not been trained as apprentices, but in full-time training in trade schools, and they are accepted into jobs.¹⁰

Dean Endersbee is rather depressed by it all. He laments the difficulty which teachers have today of competing with television to capture the attention of children. He claims that the television generation's attitudes carry over into attitudes to education:

In education, we see that the concepts of disciplined training, and mastery of subjects, have departed. The so-called 'hard' subjects — mathematics, physical sciences, foreign languages, even English — have lost favour and in their place we see so-called 'relevant' subjects such as social studies. Such subjects may not be rigorous, and much time is devoted to forming social attitudes and political opinions rather than acquiring a body of knowledge. To a certain extent we have tended to move away from the rigour and excitement of learning, to entertainment. By contrast the rigour of Japanese school education is well recognised, and is the basis of their knowledge-intensive technological society.¹¹

Endersbee quotes a recent source as indicating that illiteracy in Japan is generally estimated to be below 1%. He acknowledges that cross-cultural comparisons are difficult. But he points out that the recent Australian Senate inquiry in 'Preparation for the Workforce' concluded that 'at least 20% of young people who leave Australian schools each year are insufficiently trained' to be able to take an effective part in work where literacy is required for effective functioning.¹² I do not take Dean Endersbee to be calling for strictly vocational education in the schools. If he were calling for a return to inflexible core curricula, I would beg to differ from him. But as to the need to promote an education system that readies the next generation of Australians for the world of science and technology, there can really be no dispute. As for the need to capture the imagination of young people and to keep them in education, if we are to compete on anything like equal terms with Japan and the United States, there can be little doubt. Because the lead time for educational changes of this kind is long, we should all be considering these problems. Each of us should contribute what we can to this debate. The future health of our economy and society depends upon its correct resolution. I call your attention what Karmel, Williams and Endersbee have written.

PRESENT LAWS AND TEACHERS

I am partly relieved from the obligation to deliver a treatise to you on the legal obligations on teachers by the recent publication by Queensland University Press of the second edition of a useful text called 'Australian Schools and the Law'.¹³ This book examines in simple language the sources of our legal system applying in schools — both common law and legislative. It draws distinctions between the position obtaining under the

general law in government schools and the position that can arise under a contractual relationship in respect of non-government schools. Among the useful topics dealt with in the book are:

- . schools and the criminal law;
- . corporal punishment and assault upon pupils by teachers;
- . liability for accidents to students;
- . obligations in connection with attendance at school;
- . safety outside the school ground;
- . parental custody and access;
- . legal implications of counselling;
- . copyright law and teachers.

Various other matters are dealt with in the text, including rights of teachers as against pupils and parents or guardians in respect of homework, after-school detention, disclosure of information about students, accidents to teachers and so on. Any one of these topics would be worthy of a full address. But I shall spare you.

Two recent issues have come before the courts and it is these that I want to discuss.

First, I would refer to a case which has reached the highest court of our country, the High Court of Australia. The case was argued in March last year and the High Court reserved its decision. It has still not yet presented its decision. I understand that this is the longest backlog of any case currently before the High Court. It is an indication of the difficulty of the issues involved. It relates to the duty of care owed by a teacher to his pupil.

The case is Introvigne v. The Commonwealth of Australia.¹⁴ In the case, a schoolboy aged 15 was playing with friends in the school quadrangle of the Woden Valley High School in the Capital Territory. He was engaged in this way a few minutes before the school was due to commence at 8.30 a.m. Together with other boys, he swung on a halyard attached to a flagpole in the school grounds, so that at times the full weight of a boy was suspended on it. At a time when the plaintiff was not swinging on the halyard, the top of the flagpole became detached and fell onto the plaintiff's head. He received very serious injuries. At the time of the accident, only one teacher was assigned to the supervision of the pupils. All others were attending a special meeting arising out of the death of the Principal of the school on the previous night. There were usually five to 20 teachers in the grounds at the time the incident occurred. The boy brought an action in the Supreme Court of the Australian Capital Territory claiming damages for the personal injuries he

sustained. He claimed damages against the Commonwealth for breach of the duty it owed, as occupier of the school premises, to the pupils. It was also claimed that the Commonwealth was liable for the negligence of the teaching staff. An action was also brought against the firm of architects who designed the flagpole. I need not trouble you with this.

The trial judge, Mr. Justice Blackburn, dismissed the boy's claims against all defendants. The boy appealed. His appeal was allowed by the Full Court of the Federal Court of Australia. That court unanimously held that the Commonwealth was not liable for breach of its duty as an occupier of the school. It could only be so liable, it was held, if damage to the boy was caused by an unusual danger arising out of activities carried out or permitted by it, which danger it could foresee and against which it took inadequate protective or supervisory steps, so that damage resulted. It was held that in the present case the Commonwealth could not have foreseen the unusual danger because no-one had previously encountered or foreseen the kind of accident that happened. It was just an unpredictable incident.

However, the Federal Court went on to hold that the Commonwealth was liable in negligence because the duty of care owed by a teacher to a pupil requires that he should take such measures as, in all the circumstances, are reasonable to prevent physical injury to the pupil. It was held that the extent of the duty of care was not diminished by the exigencies of the occasion and that the accident resulted from the negligence of the staff. At all government schools, it was held, the Crown is liable in tort for the teachers' acts or omissions in the course of his employment. It was also held that the Education Ordinance of the ACT gave rise to a legal duty of the Commonwealth towards pupils attending their schools to take reasonable care for them:

It is now established as the law of Australia that a government school teacher, in performing his duties, is exercising authority derived by him from the Crown in respect of obligations assumed by the Crown. The doctrine that a government school teacher derives his authority, not from the Crown but by direct delegation from the parents of the pupils ... was rejected by the High Court in ... 1964. ... The position may be different in the case of non-government schools. ... In their case there may be delegation by the parents of the pupil of parental authority to the School Council, Trustees or other Governing Body of the school.¹⁵

In short, the Full Federal Court came to the view that the teachers were negligent (and therefore the Commonwealth liable) because:

- . there should have been a rule that the pole was not to be used unless with the express authority of a teacher;
- . it was reasonable foreseeable that the flagpole more likely than not would be used in pranks or other mischievous activity;
- . there was insufficient and improper supervision of the pupils in the school grounds which, though possibly understandable in the circumstances, did not diminish the extent of the duty of care owed to the pupils: '

Children are in need of supervision. Their parents cannot provide this when the children are at school. The teachers must provide it. It was unfortunate that the death of the Principal led to the brief staff meeting and only one members of staff being made available to perform supervisory duties in the ground; but this neither diminishes the scope of the duty of care nor operates to prevent the conclusion that the duty was breached, as it was on that occasion.¹⁶

The Federal Court ordered a retrial, limited to the issue of how much compensation should be paid to the boy for his severe damages. The Commonwealth has appealed to the High Court of Australia. As I have said, we have not yet received the decision of the High Court. Many reported cases, including this one, illustrate the legal liability of teachers to pupils in respect of inadequate supervision in playgrounds, in science laboratories, in sporting activities, in school outings, in unsupervised periods and in the use of dangerous equipment. The decision in Introvigne shows just how far the courts will push the principle of duty of care, to ensure that pupils receiving physical injuries can recover compensation on the basis of the teachers' duty of care.

POOR EDUCATION : LEGAL LIABILITY?

In the United States, the liability of teachers (and through them school authorities) is nowadays being pushed forward towards a liability in respect of incompetent academic instruction. A number of suits have been brought alleging that the student's intellectual deficiencies are produced by so-called 'educational negligence' in the school system. The discussion with which I began this paper, and the debate in Australia about the quality of education in our schools, makes this American development one which not only teachers but parents and citizens too will be examining with close attention. We do not always follow United States legal developments. But often our American cousins show the way we later follow. They have great legal imagination, adventurous judges and a population with a seemingly limitless desire to litigate the problems of society in courts of law. Gore Vidal recently claimed that the American middle aged had replaced sexual activity with litigation.

Three cases have been brought recently in the United States claiming 'educational negligence'. In each of the cases, the cause of action was rejected. However, sufficient was said to indicate that this is a potential 'growth area'. Legal commentary in the textbooks in the United States suggests that this is likely to be so.¹⁷ The three cases can be quickly mentioned:

- . In one, an 18-year-old high school graduate claimed that his school was negligent in that it failed to provide 'adequate instruction, guidance, counselling and/or supervision in basic academic skills such as reading and writing'. In particular he alleged that the school failed to diagnose his reading disabilities, assigned him to classes in which he could not read the textual material, promoted him with the knowledge that he had not acquired skills necessary to comprehend subsequent course work and allowed him to graduate with only a fifth-grade reading ability, when the State's education code required an eighth-grade level before graduation. The California Court of Appeals affirmed the trial court's decision to dismiss the claim for failure to state a cause of action known to law.¹⁸
- . In the second case, a high school graduate had received failing grades in several subjects. A New York education statute required the Board of Education to examine pupils not already in special classes who continuously failed. The school authorities did not attempt to examine the pupil or diagnose his problem. After graduation, he realised he lacked basic reading and writing skills and found it necessary to seek private tuition. He claimed the cost of this extra tuition. The court dismissed the claim.¹⁹
- . The third case involved a boy who was given an IQ test by a school-employed psychologist shortly after enrolling. He scored on this test near the top of the retarded range, but was put in a special class with the recommendation that his IQ be retested within two years. He was never retested and was educated as retarded until he turned 18. At that age, he transferred to an occupational training centre, was given an IQ test and found to be of average or slightly above average intelligence. He sued for educational negligence. In this case, the matter went to trial and he won a verdict. However, the New York Court of Appeals reversed the lower court's decision and dismissed the claim.²⁰

We have not seen any similar cases in Australia. Some of the language in our court decisions may suggest that no such case could 'get off the ground'. For example, in the Introvigne case, a distinction was drawn by the judges between the legal duty to look after pupils in the care of a school and the legal duty to educate a child. It was said that the Commonwealth did not owe a duty to educate children but, having received the children into the school, it did owe a duty to be careful for their physical safety. On the other hand, American writers are increasingly pointing to the unsatisfactory nature of the distinction between teachers' and schools' owing an acknowledged duty for the physical care of a child yet not owing a duty to the intellectual advancement of the child. It is pointed out that the whole object of having the child at school, of accepting the principle of compulsory education, is to ensure that a child does receive tuition and instruction and does so at an appropriate level. This is how one United States writer put it:

The plaintiff may also argue that the long-recognised duty of care for the physical safety of students should apply by analogy to academic instruction. In physical injury cases, educators have been held to a duty of supervision and a duty of instruction. Negligent instruction leading to physical injury is clearly an actionable tort. Further, a teacher acting in a supervisory capacity may be liable for either misfeasance or non-feasance resulting in physical injury. Thus, there is ample precedent that would directly apply to the situation under discussion, if not for the different types of injuries involved. The complaining student might argue that there is no legally significant distinction between physical injuries and the kind of non-physical injuries caused by inadequate academic instruction. ... Medical malpractice involves physical injury, while psychiatric malpractice results in non-physical harm, yet both are viable causes of action.²¹

In discussing the viability of the development of such a legal cause of action, United States commentators have, in a way that does not always happen in Australian legal texts, frankly acknowledge the policy considerations that have to be weighed. One of these is the fear of excessive litigation. This represents the concern that there would be a flood of claims by pupils and parents alleging incompetent instruction by particular teachers or schools. Damages would have to be paid ultimately by the taxpaying community. To this fear, one commentator has suggested that there are already sufficient inhibitions against litigation and that we should not be overly concerned. Certainly in Australia, where cost rules are different to the United States, this would be the case.

Perhaps a more pertinent concern would be that of judicial interference in educational policy making. It is claimed that courts lack expertise in the educational field and that determination of 'educational malpractice' would be a much more problematical and uncertain thing than the stark injury that is usually done by medical or legal negligence. According to this view, it would be better for there to be improvement in the standards of schools as a result of administrative action rather than as a result of ad hoc courtroom inquiry. On the other hand supporters of educational negligence say that court inquiry and legal liability may itself promote the cause of reform. Moving the juggernaut of education is often difficult and may be promoted by well chosen law cases with highly publicised claims of incompetent instruction, neglect of particular pupils or teaching that falls below professionally acceptable standards.

Another concern that has been expressed in the United States is that educational negligence might discourage competent teachers from entering the profession. Although, in Australia at least, the principle of employer liability for the conduct of the employee could remove the danger of personal financial injury to the teacher, the impact on his reputation and the inconvenience and publicity of litigation of this kind could amount to a worrying problem. Educators might, furthermore, voluntarily retreat to safe minimal standards, at the price of imaginative or adventurous teaching, in order to reduce their vulnerability to law suits. Yet if a teacher is incompetent as an instructor, should he be immune from suit by those he harms far more profoundly than by neglect in the schoolyard?

One commentator in the United States has suggested that although no plaintiff has yet succeeded in gaining recognition of a cause of action in educational negligence, in principle such an action could be established by the simple proof of the teacher's duty of care, the breach of the proper and reasonable standard of instructional care resulting in tangible injury causing damage. In particular, it is suggested that if claims were limited to the costs of remedial instruction, some of the problems that stand in the way of recovery against teachers would be removed.²²

All of this may seem esoteric in the Australian context. To some extent the rules governing 'standing to sue' and the principles limiting the class action or representative action, as well as the rules relating to professional costs and the general disinclination to resort to litigation, have all so far inhibited a claim for educational negligence. I do not say that such a claim is around the corner. Even in the United States, it has not so far proved very successful. Furthermore, in Australia the actual liability of teachers may differ from State to State, depending upon the duties imposed upon teachers and the Crown under the educational legislation which differs in different parts of Australia. But I do think it likely that increasing community concern about educational

standards will evidence itself one day in an endeavour to test the legal duty of teachers to give education of a suggested standard to pupils in their care. The measure of the standard could doubtless be proved, as in other claims of professional negligence, by comparison to the proved standards of ordinary, careful professional men and women. If teachers claim full membership of the club of professionals, they may have to expect the ultimate development of legal liability to meet the appropriate standard in the exercise of their professional talents. Doctors and lawyers are not limited to liability for physical injuries done to patients and clients. They are usually liable for intangible consequential losses that result from the incompetent performance of their professional duties although there is an anomalous exception in the case of barristers appearing in court. Mind you, in the case of doctors and lawyers, the duty of care is usually more clearly defined and determined by specific contractual arrangements. But with the proliferation of medical services in large government hospitals and the advent of government legal aid bodies, even this is changing. In due course, some disaffected pupil or parent or P & C group will bring a claim of educational negligence in Australia and we will then see whether the teacher's legal duty of care goes beyond protecting pupils from physical injury in the playground and science laboratory to what is perhaps the more relevant and usually more profound professional injury that can result from indifferent, ill-motivated, incompetent or just plain lazy teaching. The Law Reform Commission's work on reform of the standing and on class actions may be specially relevant for turning such a test case into a powerful agent for educational change and accountability of schools and teachers to the pupils and their parents.

SCHOOLS AS AGENT OF CHANGE

Finally, can I say a few words about schools and teachers themselves as agents of change? The tremendous responsibility which falls upon teachers to help mould the thinking of future generations of Australians must be frankly acknowledged. In a time of change, it is important that teachers, even in specialist disciplines, should be alert to the primary obligation of fostering an inquisitive spirit and a willingness to question things long settled and accepted. A recent text on 'Teaching Human Rights'²³ pointed to the complacency and narcissistic self-satisfaction of a great deal of Australian society. Many of the contributors urged the need to teach human rights as the 'fourth R'. A couple of the contributors called attention to the danger lest the effort should turn into a dogmatic imposition of one perspective only of rights. To do this would itself be an invasion of the human rights of pupils. Hence, Professor Peter Singer preferred 'teaching about human rights' rather than 'teaching human rights'.²⁴

Against the risk that teaching becomes entertainment, and that attention to the essential basic knowledge is neglected, it does seem a reasonable inference from the patterns of youth unemployment, loss of school retention, lack of adequate trade education and likely patterns of future employment, unemployment and leisure, that more could be done in our schools to teach people how to cope with life as adults in a fast-changing society. Part of that instruction should, as it seems to me, be directed at instruction about the law and the operations of society. Part should be directed at promoting a sensitivity for the rights of others and a genuine tolerance about difference and harmless unorthodoxy.

Teachers have a great responsibility and a great opportunity. It is not an easy time today to be a teacher. The pressures come from all sides. Inquiries, reports and speeches bombard you. Now on the sidelines, the law nagging away threatens further complications.

I owe so much to my own teachers that I lose no opportunity to speak to gatherings of educationalists and to pay tribute to the vocation of teaching. Parents aside, no group in the community has the opportunity to have such a profound influence upon the next generation. Their influence far transcends that of the politicians, the lawyers and the judges. And it is because of this influence that they attract the scrutiny of pundits, soothsayers and ordinary citizens. My observations are those only of an interested citizen. But I am grateful to you for inviting me to make my first visit to Whyalla, to share my thoughts with you.

FOOTNOTES

1. South Australia, Committee of Inquiry into Education, Education and Change in South Australia, (Dr. J.P. Keeves, Chairman), First Report, 1981, para. 5.7.
2. D. Novick, 'The Keeves Report', Pivot, Vol. 8, No. 1, 1981, 42-5.
3. J. Bremer, 'How to reform education : Open those closed systems', Australian, 6-7 June 1981, supp. 6.
4. P. Karmel, 'Quality of Life -- The Continuing Challenge', Unpublished paper for the Diamond Jubilee Conference of the Australian Federation of University Women, 24 January 1982.
5. Signposts at the Crossroads in Drive for Education, the Age, 1 February 1982, 21.

6. Karmel, 3, Table 9.
7. The figures are based on the number looking for full-time and part-time work.
8. B.R. Williams, 'Technological Employment and Unemployment and the Implications for Education', Lecture at University of Tasmania, mimeo, 10 October 1979, 14.
9. ibid, 13.
10. L.A. Endersbee, 'Towards an Australian Technological Policy', the Hawken Address, 23 October 1981, Address to the Queensland Division of the Institution of Engineers, Australia, 19 October 1981, mimeo, 7-8.
11. ibid, 34-5.
12. Cited Endersbee, 35.
13. A.E. Knott, K.E. Tranc, J.L. Middleton, Australian Schools and the Law, Uni. Qld. Press (2nd ed) 1980.
14. (1980) 32 ALR 351.
15. ibid, 261-2.
16. id, 265.
17. See eg 'Educational Malpractice', 124 Uni.Pennsylvania L.Rev, 755 (1976); D.S. Tracy, 'Educational Negligence', 58 North Carolina L.Rev, 561 (1980).
18. Peter W. v. San Francisco Unified School District, 131 Cal.Rptr. at 863 (1976).
19. Donohue v. Copiague Union Free School District, 408 NYS 2d 584, 585 (1977) Affd. 47 NY 2d 440 (1979).
20. 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.

21. Tracy, 566.
22. *ibid*, 596.
23. Australia, National Commission for UNESCO, 'Teaching Human Rights', AGPS, 1982.
24. Professor Peter Singer, *ibid*, 95.