

Book Review

Education and the Law

Ian M Ramsay and Ann R Shorten

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In 1990 it was noted that while it might be, too early to claim that there is a significant corpus of school law in Australia, there is, nonetheless, a sufficient number of, and diversity in, school law cases to justify the claim that school law is an established area of interest for both legal and educational practitioners alike.¹ *Education and the Law* is confirmation that the law relating to education is an established area of interest, but it is also evidence of an emerging but identifiable body of law in Australia that might comfortably be labelled 'Education Law'.

Education and the Law is both timely and appropriate. Written by Professor Ian Ramsay and Dr Ann Shorten, the book also contains a number of chapters that have been written by specialist contributors. Significantly, the book is a much more detailed treatment of the laws governing education than previous Australian texts on the topic.² And unlike those previous, texts, it covers, in varying degrees of depth, the laws regulating not only primary and secondary schooling but also post-secondary education.

The book is divided into two parts. Part I, comprising five chapters, examines the legal framework governing primary, secondary and post-secondary education in the states and territories of Australia. Part II, also comprising five chapters, examines a range of issues of particular significance to educators and educational administrators.

While Chapter 1 simply presents an overview of the chapters that are to follow, Chapter 2 addresses the legal framework of primary and secondary schooling and territories of Australia. It examines the powers of education authorities to establish and close schools for example, and it outlines laws governing the various advisory boards and school councils in the different jurisdictions. It discusses, in varying degrees of depth, such matters as school records and freedom of information legislation, parental involvement in the management of schools, religious instruction in schools, compulsory education, school discipline, home schooling, and gifted and special children in schools. The chapter emphasises government schools, but there is also some examination of non-government schools and overseas students in school education. The chapter concludes with a rather brief discussion of what are termed 'miscellaneous matters': health issues, school dress codes, controversial issues in schools, defamation in schools, and common law principles relating to expulsion, detention and corporal punishment.

Chapter 3 addresses the laws governing the teaching profession in each of the states and territories. It examines the legislative provisions regulating such matters as the qualifications and registration of teachers, and the appointment, transfer, promotion, and disciplining of teachers. It

also addresses in some detail public sector management legislation and its application to teachers in those jurisdictions where, the authors say, such legislation applies. It concludes with a brief discussion of the laws, governing the mandatory reporting of child abuse.

Chapters 4 and 5 are useful additions to a text of this nature. Chapter 4 provides an overview of the various statutes regulating technical and further education, as well as vocational education, in the various states and territories. It also briefly addresses the governance of universities in Australia, including the office of university visitor. Chapter 5 presents an outline of the legislative framework by which the Commonwealth Government funds education in Australia.

Chapter 6 discusses the liability of teachers and education authorities for physical injuries sustained by students. It examines, in a well structured way, such issues as where and when the duty to take reasonable care for the physical well-being of students can arise, and it usefully explores theoretical and practical dimensions to the issue of breach of the standard of care. It concludes with a brief discussion of the issues of causation and defences to a negligence action.

Chapter 7 is an articulate, detailed and well structured treatment of anti-discrimination laws and education. The chapter begins with a discussion of the constitutional basis of, and the framework and scope of, federal and state anti-discrimination and equal opportunity legislation. It then explores in some detail how courts have interpreted various legislative provisions in their application to a range of matters arising in the context of education, including the Provision of different curricula in schools, behaviour and grooming policies in schools, and educational services for people with disabilities. The chapter concludes with a well stated discussion of the application of anti-discrimination and equal opportunity laws to employment in education.

Chapter 8 is an informative discussion of the framework and operation of the laws governing in particular the matters of custody and guardianship of children within the context of separation and divorce. It deals specifically with the 1995 changes to the *Family Law Act 1975* (Cth), and it contains explanations of relevant concepts and terminology. While this reviewer found some of the discussion at times difficult to follow, one of the strengths of the chapter is its emphasis on the practical. Throughout the chapter there are constant references to how teachers and educational administrators might appropriately deal with family law issues and associated matters in schools.

Chapter 9 examines in an intelligible way principles of employment law and their relevance to government and non-government schools. The chapter covers a range of matters: the legal basis of the employment relationship, the traditional industrial relations systems and the emergence of enterprise agreements, common law principles of employment, the disciplining of teachers, termination of the employment relationship, and statutory remedies for unfair dismissal. Perhaps unnecessarily, both Chapters 3 and 9 deal with the disciplining of teachers, albeit with different emphases.

A revised version of a paper published in 1988 in the *University of New South Wales Law Journal*, Chapter 10 is an enlightening examination of the issue of educational negligence. It outlines the context in which educational negligence has been raised in Australia, and it summarises the American and English experiences in relation to it. It then explores whether a

claim in educational negligence in Australia could be based in principles of contract law, the law of misrepresentation, and negligence law. It concludes with an examination of the policy issues an Australian court might confront when faced with a claim in educational negligence.

Set out at the end of the book are an appendix entitled *Questions and Answers on the United Nations Convention on the Rights of the Child*, as well as an index.

Without detracting from the merits of the book in any way, several observations seem appropriate.

Given the vast amount of legislation governing education in the states and territories of Australia, it is perhaps unrealistic to expect the authors to have 'gotten it right' on every occasion. However, at [2.20] the authors list freedom of information statutes which, they say, were in existence at the time of writing. There is no mention of the *Freedom of Information Act 1992* (WA), an Act that came into operation in 1993. In addition, at [3.14] the authors suggest that because of various amendments to a number of Western Australian statutes, teachers in Western Australia are 'public service officers' within the meaning of the *Public Sector Management Act 1994* (WA). The authors then go on at [3.22]-[3.24] to discuss the disciplining of Western Australian government teachers as though the disciplining provisions of the *Public Sector Management Act 1994* (WA) apply to those teachers. However, this does not appear to be the position in Western Australia. There have been no legislative amendments in Western Australia which would mean that government school teachers appointed pursuant to the *Education Act 1928* (WA) are public service officers and therefore subject to the provisions of public sector management legislation in that state. The obvious difficulties associated with any attempt to locate and accurately summarise the vast body of legislation in each of the states and territories should be borne in mind when one reads the discussion and summaries of the legislation throughout the book.

Each chapter contains references to additional legal materials and journal articles, either in footnotes or in a list of references at the end of the chapter. This approach is to be applauded. However, on some occasions the reader might have been referred to articles in journals published overseas or by professional associations in this country that are pertinent to the discussion or more current than those the authors have mentioned. For example, the brief summary of the English experience concerning educational negligence in Chapter 10 would be enhanced by references to recent articles examining the decisions of the Court of Appeal and the House of Lords and Published in the English journal *Education and the Law* in 1994 and 1995 respectively.³

In any text, the index is a crucial tool. However, on too many occasions the index in *Education and the Law* is decidedly unhelpful. For example, in order to find references to defamation, the reader must browse various other headings such as 'Controversial issues' and 'New South Wales' - there is no separate entry in the index for defamation. And under the heading 'Disciplinary procedures' there are references to the disciplining of students only; no references are given to the considerable body of information concerning the disciplining of teachers set out in Chapters 3 and 9.

In a review such as this, it is tempting to argue passionately in favour of the need for

additional chapters or for a tilt in the balance with respect to the chapters that are included. An additional chapter might cover the issue of the right of teachers to touch students, for example, and an expanded discussion of the reporting of child abuse which appears in Chapter 3. These are issues of real concern for many educators. It does seem, too, that many of the Chapters in Part II adopt a primary and secondary education perspective; a post-secondary education perspective is almost entirely missing.

Despite such observations, *Education and the Law* is a useful and much needed book. Both Professor Ramsay and Dr Shorten have researched and written in the area of education and the law for some years, and the erudite treatment of the vast body of information included in the book is praiseworthy. In the preface to the book the authors point out, and correctly so, that it is essential that educators and educational administrators be informed of the legal context of their professional work. While it presupposes some understanding of the framework and operation of Australia's legal and political system, the book certainly informs, and informs well. It is a book that would rightly take its place on the bookshelves of teachers, educational administrators, academics, and members of the legal profession with a roving eye on the emerging field of Education Law.

Endnotes

1. Birch, I. (1990) Australia. In I. Birch & I. Richter (eds), *Comparative School Law*. Pergamon Press, Oxford, p 139.
2. Eg., Boer, B. & Gleeson, V. (1989) *The Law of Education*. Butterworths, Sydney; Tronc, K. & Sleigh, D. (1989) *Australian Teachers and the Law*. Butterworths, Sydney.
3. Holloway, J. (1995) The Rights of Individuals who Receive a Defective Education. *Education and the Law*, 6, 207; Holloway, J. (1995) The Liability of the Local Education Authority to Pupils who Receive a Defective Education. *Education and the Law*, 7,125.

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