THE LAW OF HOME SCHOOLING IN AUSTRALIA

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I. INTRODUCTION

On 15 November 1999, the *Sydney Morning Herald* contained a photograph of a mother watching her three adolescent girls sitting at a table working from school books. The photograph was surmounted by the headline, "Mum's Common Sense, Dining Room School Tops the State."[1] The article accompanying the photograph explained that the Frazer children of Gladesville, NSW had won the Gould League/*Sydney Morning Herald* 1999 Project Environment for art and media research projects in a State-wide competition. Mrs. Frazer, the mother and teacher of the prize-winners, identified "ideological beliefs and common sense" as the reasons for her choice of home schooling. She commented that she had been "disenchanted with the school system. . ." This story from the mainstream press raises a multitude of issues for educators and legal regulators. A key issue for parents is their interest in overseeing the style and content of their children's learning, while the State is concerned with furthering its perceived interest in the education of its citizenry through legal regulation. For students, education is a human rights issue. This entitlement to appropriate and effective instruction to meet their learning needs requires recognition. The difficulty lies in the balancing of these interests, which ideally are complementary and not competing. This paper seeks to explore some of these issues and comment upon current mechanisms for the regulation of home schooling in Australia.

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1. Sharon Verghis, *Mum's Common Sense, Dining Room School Tops the State,* 3 Sydney Morning Herald (15 Nov. 1999).

II. THE "WHY" OF HOME SCHOOLING

There has been a resurgence of interest in home schooling in a number of jurisdictions that has caught the attention of a range of commentators. In Western history, forms of home schooling predominated until the Industrial Revolution and the introduction of compulsory education statutes. This resulted in the involvement of the State as educator.[2] One of the significant reasons for learning at home in colonial Australia and elsewhere was geographical isolation.[3] In more recent times, home schooling has become a choice by parents and students.

Several reasons are expounded to support the home schooling "choices" made by an increasing number of parents today. A primary explanation in both Australia and the United States is the exercise of religious freedom, so that children might learn in accordance with parents' religious beliefs.[4] However, this is not the sole justification for abandoning public and private school systems. Parents from a secular tradition also reject schools. Some of these belong to what has been called the "unschooling," "natural learning," or alternative schooling movement. In the United States in particular, violence in schools is an emerging reason for removing children from schools and undertaking instruction at home.[5]

The historical dimension to the question of why children are educated at home is critical to legal policy development in the area of home schooling. Legal regulation needs both to acknowledge the long and successful tradition of learning at home and to reflect the changes that have taken place in recent years both in schooling and in the wider world. Home schooling has become a **choice** for families, and there is no evidence that it will cease to be less desirable in the near

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2. *See, e.g,* Henry Marrou, *A History of Education in Antiquity* (George Lamb trans., Sheed & Ward 1956); Marion Amies, Schooling at Home in Nineteenth Century Australian Fiction, 3, 1 Discourse 40 (1982).

3. *See* Amies, *supra* n. 2; Kathy Kearny, *Homeschooling Gifted Children,* 101 Gifted 28 (1997).

4. *See* Francine Russo, *Home School Report Card: Parents are teachers for a million kid. But does home schooling work?* Time C10 (Sept. 13, 1999); Roger Hunter, *Utopian Education: The Home Schooling Phenomenon* in *Culture, Education and the State: Proceedings of the 19th Annual Australian and New Zealand Comparative and International Education Society Conference,* North Ryde 182 (J. Liesch ed., 1991).

5. *See* Russo, *supra* n. 4.

future. Indeed, at least one commentator, Dale Spender, has identified home schooling as a "natural choice" for the future and has made incisive observations about home schooling through reflecting on the past and the future. She comments:

> Schools are currently in crisis. And not just because they have been starved of resources; or even that they are becoming increasingly violent. But because the entire system—from the way the students are divided up, to the way the day is divided up—have all been designed to serve the needs of a very different society. The industrial revolution and mass schooling go together. And both are closely linked to the factory system. This is why the school day is marked by bell ringing. It is why students have been regimented into classes, grades and rows. It is why teachers have been the authorities who not only keep children in line, but who have kept close control over information. Schooling has appropriately prepared people for the work place.
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> The problem is that the regimented factory system is no longer the main model for work. More and more people are doing part-time work—and from home. More and more are moving away from the daily commute and the "nine-to-five" job. They are telecommuting, taking on consultancies, shifting to the new sources of wealth.[6]

In view of the dynamic environment in which education is now offered, the pressing issue for legislators in the regulation of home schooling is to redefine and articulate clearly the interest of the State in the education of its citizenry. The process of definition will itself presage the mechanisms and forms of regulation which are appropriate for home schooling in the future. In this way the interests of all groups can be recognised, and legal regulation by the State will complement the choices made by parents,[7] rather than compete with them or give rise to antagonism.

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6. Dale Spender, *Home Schooling*, <http://www.espc.com.au/dspender/intro/columns/col_hs.html>.

7. Some of these issues are raised by Kathleen Carins in her paper *Home Education in Tasmania* in *Open, Flexible and Distance Learning: Education and Training in the 21st Century*, 54 (J. Osborne, et. al. eds., U. of Tasmania 1997).

III. LEGAL ISSUES AND HOME SCHOOLING

The urgency in the consideration of legal regulation of home schooling arises from at least two important sources. The first is that the choice for families to educate their children at home is increasingly popular.[8] Secondly, there is dissatisfaction expressed widely amongst home educators that existing forms of legal regulation are too prescriptive and intrusive.[9] A summary of recent official records of students enrolled in home education and the contrasting figures estimated by home education support groups appears below. These factors suggest strongly that whatever form of legal regulation is chosen by the States, home education cannot be regarded as a "fringe" interest. The regulation must form an integral part of any statutory scheme, and provisions should reflect the legitimate interests of students and parents. The provisions of the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (UNCROC), to which Australia is a party, should form a backdrop to the process of defining the rights and interests of students and parents. Whilst these instruments are not part of Australia's domestic legal framework per se, it has been made clear in the courts that they do represent a "legitimate and important influence upon the development of domestic law."[10]

8. Telephone interview with representative from the Home Sch. Unit at the Bd. of Studies, NSW (Jan. 2000); Letter from Susan Buggy, Exec. Officer, Tasmanian Home Ed. Advisory Council (Jan. 27, 2000) (advised that in Tasmania, the number of students and families registered with THEAC "constantly fluctuates, with an ongoing increase in registrations being evident since 1994.").

9. For example, see opinions expressed at the Home Education Australia website at <http://homeschool.3dproductions.com.au>.

10. *Mabo v. Queensland,* 175 CLR 1, 42 (1992); *Human Rights in Australian Law* ch. 2 (D. Kinley ed., Fedn. Press 1998).

Number of children registered for home education with State authorities (1997)		Number of children in home education estimated by home education support groups (1997)[11]
NSW	1587 (1999)[12]	5000
Qld	922	2000-4000
WA	800	2000
SA	250	150
Tas	529 (1999)[13]	Not available

With this background in mind, the issues for effective legal regulation may be defined in the following manner:

1. Legal regulation of home schooling must address the issue of **freedom of the exercise of religion.** This factor has been highlighted most famously in the United States in cases such as *Wisconsin v. Yoder*,[14] in which Amish parents challenged compulsory attendance statutes. However, the issue of exercise of religious freedom has important resonance in an Australian context, not merely on account of the significant number of parents in the home schooling movement in Australia who reject state education on grounds which are broadly associated with religious freedom.[15] The Commonwealth Constitution provides amongst its meagre rights content a guarantee of the free exercise of religion. Section 116 appears in Chapter V of the Constitution which is headed "The States," but in its terms operates as a restriction on the power of the Commonwealth to affect the free exercise of religion.[16] In the absence of Constitutional provisions binding the states to uphold freedom of religion, the provisions of the ICCPR, in

11. Home Educ. Australia, *supra* n. 9.

12. Home Sch. Unit at Bd. Of Studies NSW, *supra* n. 8. Figures are collated in the Board's Annual Report.

13. Buggy, *supra* n. 8. My thanks are extended to Ms. Buggy for her assistance with information on the regulation of home schooling in Tasmania.

14. 406 U.S. 205 (1972).

15. Roger Hunter, *Home, School and Education—Fundamentalist Christian Education and its Relationship to the Homeschooling Movement* in *Australian and New Zealand Comparative and International Education Society Conference Proceedings* 129 (1989).

16. *See* George Williams, *Human Rights under the Australian Constitution* 110 (Oxford U. Press, 1999).

particular Article 18, have special significance.

2. A second legal issue for regulators will be the **rules governing instructors** of those who learn at home. Potentially the home instructor may be a parent, family member, or unrelated employed tutor. Regulations should address the issue of instructors in a number of ways. These might include identifying types of persons who might be instructors and the competency levels required for instructors. Regulations may seek to provide differential rules for parent and non-family instructors and may provide for a certification process. The level of competency which is required of a home schooling instructor will depend significantly upon how the State views its role in the education of its citizenry, and the degree of weight it is prepared to give to the individual choice and interests of students and parents.

3. A third issue for legal regulation may be the **content of the curriculum**. More specifically, there may be a desire to specify particular subjects or competencies which must be included in a core or minimum curriculum. Competencies in literacy and numeracy are obvious inclusions in such a category. Some jurisdictions in Australia already provide advice to home educators by way of guidelines on minimum curriculum.[17] A further question is whether such guidelines should be formalised as regulations made under the relevant State statute.[18] A more difficult issue for consideration is the extent to which students who learn at home should be permitted to participate in testing carried out by State education departments in order to gain certified qualifications and university entrance scores. Perhaps this issue should be framed more broadly to include consideration of whether those who learn at home should be offered a mode of **state-sponsored testing** which identifies skills and competencies at particular levels or ages. The legal regulation of home schooling might provide for a series of formal tests which home educated students may undertake and which are recognised for the purposes of

17. *See, e.g.*, NSW Bd. of Studies, *Guidelines for Registration for Home Schooling* Appendix 2 (Bd. of Studies 1998).

18. *See, e.g., Report No 17/51 of the Regulation Review Committee Report on the Education Amendment (Home Schooling) Regulation 1998* (Parliament of NSW 1998) (recommendations given).

entrance to post-secondary education.

4. The topic of state **monitoring of the provision of education** at home is sensitive. Overly prescriptive regulation, particularly if it were to provide for regular home visits by education department staff, might give rise to privacy concerns on the part of home schooling families. Where forms of monitoring are seen to further the interest of the state in the education of the citizenry, civil liberties interests of families should represent one of the factors considered in the development of rules and policies. A requirement that a student's progress is documented via a home schooling portfolio may serve as an equally effective mechanism for monitoring the efficacy of a student's learning.

5. An emerging legal issue in home education in the United States concerns the regulation of participation by home schooled students in the **organised extra-curricular programmes** offered by state schools. Participation in school sporting competitions and teams has become a contested issue in some U.S. states as parents challenge state statutes that permit only students enrolled in state schools to play in school teams.[19] Parents of students in home schooling in the United States have argued that the issue is ultimately one of fairness and equal treatment. They claim that the parents of students in home schooling deserve value for the taxes paid, and permitting students in home schooling to participate in state school sporting teams is one means of achieving this. One of the key concerns often expressed about home schooling is the lack of opportunity for socialisation of home schooled students.[20] Regulation of participation, rather than exclusion, of students who learn at home in sporting, cultural, musical, and other programmes, may be a means of addressing this issue.

19. John Cloud, *Outside Wanting In: Home schoolers won the right to escape the public system. But should they be able to play on its teams?*, Time 132 (Dec. 27, 1999).

20. *See, e.g.*, Carins, *supra* n. 7.

A. Legal Regulation in Australia[21]

Uniformly, state education statutes proceed from a premise of compulsory schooling between statutory ages.[22] Beyond this common core, there are two basic forms of regulation: statutes which equate compulsory schooling with compulsory attendance, which contemplates the possibility of exemptions, and statutes that explicitly provide for home schooling. Direct regulation of home schooling is mostly to be found amongst those statutes, which have been recently amended. Some commentators have noted the limitations of earlier statutes that rely upon Ministerial discretion in granting exemptions as the sole mechanism for regulating home schooling.[23] Amongst the more recent schemes, the Tasmanian legislation stands out for its sophistication in approach to appraisal and monitoring of home education. Significantly, in Tasmania home education is independent of the Department of Education. The Tasmanian Home Education Advisory Council reports directly to the Minister in matters concerning notification, appraisal, and monitoring of home education.[24] Further contrast between jurisdictions is highlighted in the table appended to this paper.

B. Learning from Other Jurisdictions

In 1997, Dr. Brian Ray of the National Home Education Research Institute estimated that there were 1.23 million children home schooled in the United States during the 1996–1997 school year. It is estimated that home schooling has grown at about 15% per year since 1990. With this growth rate in consideration, the U.S. Home School Legal Defense Association has calculated that there were about 1.5 million children home schooling in the 1997–1998 school year.[25] In

21. Attached to this paper is a summary table of the existing forms of legal regulation of home schooling in Australia.

22. Education Act § 8 (ACT 1937); Education Act § 22 (NSW 1990); Education Act § 21 (NT); Education (General Provisions) Act § 114 (Qld); Education Act § 75 (SA 1958); Education Act § 4 (Tas 1994); Education Act § 53 (Vic 1958); Education Act § 13 (WA 1928).

23. A. Hopkins, *Regulating Home Education*, 1 ANZELA News 11 (1993).

24. *See* <http://www.tased.edu.au/tasonline/theac>.

25. *See* <http://www.hslda.org/>.

March of 1997, a *Wall Street Journal/NBC News* poll found that 6% of parents "home-schooled, keeping [their] child out of school and teaching the child at home."[26] The number of students and the growth rate in home schooling in the United States has stimulated assessment of the form and adequacy of legal regulation in this area. As a federal system in which education is a State rather than a federal responsibility, the United States may have some lessons for the Antipodes.

In a recent survey of legal regulation in the United States, a bewildering variety of forms of legal regulation of home schooling amongst the states has been revealed.[27] Thirty-four states (67%) now have explicit special laws governing home schooling. Of these, 80% require some form of notification to state or local officials before a child can be home schooled. The survey does not reveal how successful the notification/registration systems are. The above evidence provided by home schooling support groups in Australia indicates that not all home schooled students are registered. In twenty-two U.S. states, annual updating of notification is required by law. The diversity of approaches found in the United States, in part, mirrors the differing approaches amongst States in Australia. This raises the issue of whether a movement for uniformity across jurisdictions in the regulation for home schooling is illusive or desirable.

In the matter of the curriculum, a majority of U.S. states regulate the number of days per year during which home schooling must be provided, while only seven states mandate the number of hours per day during which schooling must be offered. Forty-four states set out the curriculum requirements for students in home schooling in their education statutes. In some cases, the requirement is that subjects similar to those taught in public schools must be taught. In others, an approval process for a student's curriculum is established. Further, two-thirds of the states monitor the progress of students through yearly or periodic testing. The curriculum issues are core matters for consideration in the development of legal rules for home schooling in any jurisdiction. Some comments concerning

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26. *Id.*

27. William B. Colwell & Brian D. Schwartz, *Implications for Public Schools: Legal Aspects of Home Schools* in *Tinker at 30: A Reflection of Changes in Education Law* (1999 Conference Papers) Education Law Association 45th Annual Conference 567 (ELA 1999).

the regulation of curriculum content have been addressed above in this paper.

The authors of the U.S. survey identify a significant lack of uniformity and clarity surrounding the regulation of instructors. Half of the states do not require parents or tutors of students in home schooling to have any qualifications. There is great disparity generally between the qualifications demanded of parents and others who might teach students at home. Some jurisdictions require state certification of home schooling tutors. Arizona requires all home instructors to pass a state proficiency examination. The state of Tennessee sets perhaps the highest threshold for qualifications in requiring that a parent wishing to teach their children K–8 must hold a high school diploma or equivalent. If a parent wishes to teach a child beyond the eighth grade, he or she must hold a bachelor's degree. The issue of regulation of those who teach and the qualification base is a highly sensitive issue which is not capable of easy resolution. The degree of regulation in some U.S. states clearly outstrips Australian legislation.

V. CONCLUSION

It is time to assess the forms of legal regulation of home schooling in Australia. Effective regulation must attempt to balance the interests of three primary groups: the state, the parents, and the students. Appropriate legal regulation of home schooling may require a reassessment of the primary premise of existing statutes in compulsory attendance. Any reassessment will involve a careful redefining and rearticulation of the State's interest in the education of its citizenry and will acknowledge the impact of those international human rights norms that have an impact upon Australia. The primary objective of legal standards and rules in the area of home schooling must be effective learning for students. In a federal system in which responsibility for education remains with the states and territories, uniformity in legal regulation of home schooling may be neither entirely achievable nor desirable. However, there is abundant room for reassessment of existing statutory regulation.

APPENDIX A: SUMMARY OF AUSTRALIAN LAW OF HOME SCHOOLING

Jurisdiction	Legislation	Explicit reference to home schooling?	Exemption from attendance?	Notification/ Registration HS	Body responsible for HS	Regulation of Curriculum?	Monitoring of Program?	Regulation of Teachers?
TAS	Education Act (1994)	Yes–§ 4	§5	Yes–§ 17	Tasmanian Home Education Advisory council (THEAC)	Assistance, information, and support with program from THEAC	Process of appraisal and support from THEAC	Responsibility for education rests with parents
NSW	Education Act (1990)	Yes–§ 22	§ 22 (for pre 1935 phase)	Yes (including home visit)	NSW Board of Studies	Board of Studies: minimum curriculum guidelines–5 hours per day/200 days per year	2 year registration period; maintenance of records required	"Teacher, parent/instructor," no qualification
WA*	School Education Act (1999)	Yes–Part II, Div. 6		§ 47 (Registration of home educators)	CEO of Education Dept	§ 50 Home education moderators assess content of education program (§ 4) [Curriculum Council Act 1997]	§§ 50-54 Moderators evaluate progress	§ 48– responsible for education program Parent to be registered as home educator
VIC	Education Act (1958)	No	§ 53 (Ministerial discretion)		Minister			
QLD	Education (General Provisions) Act (1989)	No	§ 115 (Education "in some other manner that is efficient and regular")		Minister	Guidelines approved by Governor in Council		
SA	Education Act (1972)	No–§ 75, 76	§ 77		Minister			

* I am grateful for the assistance of Dr. Peter Williams of Curtin University for his assistance on this topic.