

3 *Rights, Roles and Responsibilities*

The Right to Education and the
Nature of Obligations on Australian Governments

April 2004

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Public Interest Advocacy Centre (PIAC)

Acknowledgements

Among those who provided comment and support we would like to particularly note our appreciation to Prof. Chris Sidoti, former Human Rights Commissioner, Prof. Hilary Charlesworth, Centre for International and Public Law, ANU and Prof. David Kinley, Director of the Castan Centre for Human Rights at Monash University for the valuable feedback they provided on an earlier draft of this advice.

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ISBN 0 9750250 0 7

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal and policy centre. Using its legal and policy skills, PIAC makes strategic interventions in public interest matters to foster a fair, just and democratic society and to empower citizens, consumers and communities.

PIAC was established in July 1982 as an initiative of the Law Foundation of New South Wales with the support of the NSW Legal Aid Commission.

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FOREWORD

It sometimes seems we expect a lot of our young people...

When it comes to their education and training these days we not only expect them to stay on longer at school (or in training) but increasingly our Governments are compelling them to do so through the passage of legislation raising the age at which they must stay participating in education or training.

The completion of Year 12 or its vocational equivalent is clearly the new minimum level of educational attainment if young people are to secure their future personal social and economic well-being. There are exceptions, as there always have been, but there is substantial evidence for this as a general rule.

A number of the State and Territory Governments have themselves recognised the need and have embarked upon a process of reform.

You won't find any argument from the Dusseldorp Skills Forum that the educational bar has been raised. We have been vocal advocates for recognising this new reality and have urged Governments to institute evidence-based reforms to enhance the range of meaningful opportunities available to young people for participation in education and training and access to the labour market.

That said, we have noted the linking of reforms to new legislative demands on young people (and extended to their families) and began to wonder just what Governments expect of themselves and to what extent they have been prepared to embed *those* expectations in legislation. Put differently, given that a young person is compelled to participate in education and/or training till at least the age of 15 or as long as 17 (depending on where they live) what type of education and of what quality are Governments compelled to deliver?


We took this question to the Public Interest Advocacy Centre (PIAC) seeking their advice. We are publishing that advice in full because we believe it not only offers a valuable insight into what constitutes a right to education but it raises profound questions regarding the current limitations of that right in Australia. Among these questions one of the most compelling for us is: why do our Governments appear so reluctant to articulate in legislation the right of students to an education which is relevant, of good quality and reflects individual needs?

I do commend this paper to you for consideration and would welcome your own comments on it. You can contact the Dusseldorp Skills Forum at:

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Jack Dusseldorp
Chair

MEMORANDUM OF ADVICE

1. BRIEF

PIAC has been requested by the Dusseldorp Skills Forum (“DSF”) to provide advice on the nature of obligations on Australian Governments, if any, arising from legislative extensions of the period of compulsory education.

DSF seeks the advice as a number of states have recently increased the age of compulsory school attendance or are contemplating doing so. DSF is concerned to explore whether any corresponding obligations arise on Governments in relation to the content of education provided to students required to attend an extra year of school. In particular, DSF seeks advice as to whether the compulsory extension of school attendance carries any parallel obligation on Governments to ensure that the education provided during the extra year of school is relevant, of good quality and reflects individual needs.

We address the brief by considering whether there is a right to education in Australia and the nature and extent of any such right. In doing so we consider the existence, or otherwise, of a general right to education at international law and under Australian statute and common law. We also consider whether the right to education under international law which imposes obligations on States Parties to ensure that education is appropriate and acceptable, can be extended to cover the circumstances raised by DSF.

2. THE RIGHT TO EDUCATION

(a) International Law

The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) provides that States are obliged to “recognise the right of everyone to education”. As a signatory to the ICESCR, Australia is, at international law, under an obligation to “progressively realise”¹ the goals of the ICESCR. A failure to do so is a violation of the ICESCR.² Additionally, a State Party to the Covenant must recognise the rights contained in the ICESCR by “all appropriate means, including particularly the adoption of legislative measures”.³

Article 13 of the ICESCR provides that States Parties agree that:

education shall be directed to the full development of the human personality and the sense of its dignity (Article 13 (1))

and recognise that the full realisation of this right be achieved by ensuring that :

- a) *Primary education ... be compulsory and available free to all;*
- b) *Secondary education in its different forms, including technical and vocational secondary education, shall be (writer’s emphasis) made generally*

¹ Article 2(1) ICESCR

² Paragraphs 15 & 16 of the Masstricht Guidelines on Violations of Economic, Social and Cultural Rights

³ Article 2(1) ICESCR

available and accessible to all by all appropriate means, and in particular by the progressive introduction of free education (Article 13(2)).

Availability and Accessibility

Article 13(2)(b) refers specifically to technical and vocational training and requires that secondary education “be made generally available and accessible to all”. While the ICESCR does not define the terms “available” and “accessible”, these terms are considered in General Comment No. 13 of the Committee on Economic, Social and Cultural Rights (“CESCR”) on the Right to Education (“General Comment”). A primary function of the CESCR is to determine the normative content of the ICESCR. It has done this via the analysis contained in the General Comment. The General Comment provides detailed interpretative guidance on the meaning of Articles 13 and 14. In particular, the General Comment states that while the right to education will depend upon conditions prevailing in a particular state, the realisation of the right to education has four essential features.⁴

The four essential features outlined in the General Comment include “Availability” and “Accessibility”. The General Comment notes that “Acceptability” and “Adaptability” are also essential features of the right to education.

Under the General Comment, “Availability” is considered as follows:

functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology.⁵

In relation to “Accessibility”, the General Comment provides that :

educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party.

Accessibility has three overlapping dimensions:

Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see Paragraphs 31-37 on non-discrimination);

Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme);

Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of Article 13(2) in relation to primary, secondary and higher education: whereas primary education shall be available “free to all”, States parties are required to progressively introduce free secondary and higher education.⁶

⁴ General Comment No. 1 at Paragraph 6

⁵ Ibid

⁶ Ibid

Acceptability and Adaptability

For the purposes of this advice, the General Comment's inclusion of "Acceptability" and "Adaptability" as essential features of education is significant (even though they are not directly referred to in the ICESCR).

"Acceptability" is defined at Clause 6(c) of the General Comment as:

....the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents...

Accordingly, Clause 6(c) suggests a clear duty on states to provide education that is acceptable, of good quality and relevant to students.

Both the definitions of "Acceptability" and, more directly, "Adaptability" point to the requirement to consult with students (and in appropriate cases, parents) to ensure that education is relevant and appropriate. Clause 6(d) of the General Comment which, goes to "Adaptability", refers to education being flexible so that it

can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

The requirement for "Adaptability" is strengthened by a number of additional references in international law:

- *Article 13(2)(b) of the ICESCR refers to the requirement that all secondary education must be provided in "all its different forms";*
- *Paragraph 12 of the General Comment calls for the provision of flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings;*
- *Paragraph 13 of the General Comment refers to the requirement to ensure varied and innovative approaches to the delivery of education; and*
- *Paragraph 13 of the General Comment refers to the requirement to provide technical and vocational training as a key part of secondary education.*

Best Interests of the Child

In addition to the General Comment's disclosure of the four essential features of education, the General Comment also provides that:

When considering the appropriate application of these "interrelated and essential features", the best interests of the child shall be a primary consideration.⁷

Article 3(1) of the Convention on the Rights of the Child ("CROC"), ratified by Australia, states:

In all actions concerning children.....the best interests of the child shall be a primary consideration.

CROC also elaborates on the obligations of States Parties in relation to education.⁸

⁷ General Comment No. 13 at Paragraph 7

⁸ Articles 28 & 29 of CROC

The Committee on the Rights of the Child's General Comment No. 1 on Article 29⁹ of CROC ("General Comment No. 1"), the *Aims of Education*, confirms that education should be "child-focused", acknowledging the unique characteristics of each child.¹⁰ General Comment No. 1 also states that each child has a right to a good quality education and that processes need to be established to ensure that children have input in decisions relevant to their education.¹¹

The ICESCR and the General Comment offer interpretation on the content of the right to education. In particular, they provide that States Parties have obligations to provide education that is relevant, of good quality and reflects the needs of individual students. In addition, States Parties are required to consider the interests of each child in the delivery of education. Both the General Comment and CROC, require that the best interests of the child be considered and that children should be consulted as to their needs.

(b) Australian Statutory Provisions

As a signatory to the ICESCR, Australia is bound to recognise the rights set out in the ICESCR at a domestic level. Such recognition of the right to education is required by "all appropriate means, particularly the adoption of legislative measures".¹² This section considers legislative measures adopted to effect this right.

Federal Legislation

The Commonwealth parliament does not have specific power to legislate for the provision of primary and secondary education. However, the Parliament has a limited power to legislate in relation to student assistance pursuant to section 51(xxiiiA)¹³ of the Commonwealth Constitution, which refers to, amongst other purposes, "benefits to students".

⁹ Article 29 provides:

- (1) *States Parties agree that the education of the child shall be directed to:*
 - (a) *The development of the child's personality, talents and mental and physical abilities to their fullest potential;*
 - (b) *The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;*
 - (c) *The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;*
 - (d) *The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;*
 - (e) *The development of respect for the natural environment.*
- (2) *No part of the present Article or Article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in Paragraph 1 of the present Article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.*

¹⁰ General Comment No. 1 on Article 29 of CROC at Paragraph 9

¹¹ General Comment No. 1 on Article 29 of CROC at Paragraph 22

¹² Article 2(1) ICESCR

¹³ Section 51(xxiiiA) provides that 'the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect tothe provision of benefits to students.:'

Beyond this narrow area, the Federal Government can indirectly influence the provision of education through measures such as funding and Ministerial Councils.

State Legislation

The responsibility for providing education to children and young people in Australia lies primarily with the States and Territories. Each State has their own constitution which refers to general obligations of government. The States' constitutions give broad, non-specific powers to each respective Parliament. For example, Section 5 of the Constitution Act of NSW states:

The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever: Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly.

These provisions offer little guidance on individual rights. However, under their own constitutional framework, each State and Territory has introduced legislation to effect the provision of education services. Rather than set out the provisions in each State, we confine our comments to the legislative provisions for education in NSW and then comment generally in relation to the other States. In essence, the frameworks in NSW, broadly reflect those in all other States.

General Legislative powers

The *Education Act 1990* (NSW) ("*NSW Education Act*"), provides the legislative framework for the provision of education services in NSW. The *NSW Education Act* outlines the school curriculum, the Minister for Education's functions, the requirements of attendance at school, the process for the establishment of government schools and the registration process for independent schools.

Sections 31 and 22 of the *NSW Education Act* provide that primary and secondary education is free and compulsory. The requirement that the syllabus for secondary education include technical education is set out in Section 9 of the *NSW Education Act*. Part 7 of the *NSW Education Act* makes provision for non-government and home schooling, as well as for state schools.

The *NSW Education Act* establishes bodies, provides for their constitutions and allocates them defined power within which they have authority to act. It also provides for judicial review of some of the decisions by these bodies. For example the *NSW Education Act* sets out the powers of the Board of Studies and the Minister and makes certain decisions reviewable by the Administrative Decisions Tribunal pursuant to Section 107 of the Act. The relevant decisions include the registration of non-government schools, home schooling and accreditation of schools. These rights of review reflect the principles contained in Articles 13(3) and (4) of the ICESCR.¹⁴ These provisions generally incorporate rights of "Accessibility" and "Availability".

¹⁴ Article 13(3). The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

Article 13(4). No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in Paragraph I of this Article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The *NSW Education Act* has an extensive objects provision which in many respects reflects the principles underlying the four essential features of the right to education at international law discussed above. Section 6 of the *NSW Education Act* provides as follows:

Objects for administration of this Act or of education

(1) *It is the intention of Parliament that every person concerned in the administration of this Act or of education for children of school-age in New South Wales is to have regard (as far as is practicable or appropriate) to the following objects:*

- (a) *assisting each child to achieve his or her educational potential,*
...
- (d) *provision of an education for children that gives them access to opportunities for further study, work or training,*
...
- (h) *provision of an education for children from non-English speaking backgrounds that has regard to their special needs,*
- (i) *recognition of the special problems of rural communities, particularly small and isolated communities,*
- (j) *provision of opportunities to children with special abilities,*
- (k) *provision of special educational assistance to children with disabilities,*
- (l) *development of a teaching staff that is skilled, dedicated and professional.*

While this section falls short of stating that education must be “in the best interests of the child”, it does set out objectives to which “every person concerned in the administration of this Act or of education for children” should have regard.

In addition, Section 4¹⁵ of the *NSW Education Act*, which sets out the principles on which this Act is based, provides:

it is the duty of the State to ensure that every child receives an education of the highest quality.

These Sections deal with objects and principles underlying the Act rather than powers. While they are indicative of the essential features of “Acceptability” and “Adaptability”, they do not impose specific duties to ensure that education must be “Acceptable” and/or “Adaptable”, that is, relevant, of good quality and reflecting the needs of individual students. This point is developed further in the review of administrative law set out below.

¹⁵ Section 4 Principles on which this Act is based

In enacting this Act, Parliament has had regard to the following principles:

- (a) *every child has the right to receive an education,*
- (b) *the education of a child is primarily the responsibility of the child's parents,*
- (c) *it is the duty of the State to ensure that every child receives an education of the highest quality,*
- (d) *the principal responsibility of the State in the education of children is the provision of public education.*

The legislation of other States and Territories generally reflect the *NSW Education Act*.

In summary, the States provide, via legislative measures, for:

- the establishment of educational infrastructure by allocating powers to Ministers to establish a government school system, monitor, make plans for and review its development.
- free and compulsory education.
- the establishment and registration of non-government schools.
- the establishment of structures for vocational studies.
- the review of disciplinary decisions.
- the establishment of teacher's registration boards.
- the establishment of Boards of Studies to create syllabuses.

Finally, we note that both Federal and State anti-discrimination legislation provide for mechanisms to ensure that education is provided free of race, sex and disability discrimination.

In summary, at best, Governments in Australia have recognised, via legislative measures, that education must be available and accessible at both primary and secondary levels. Issues pertaining to "Acceptability" and "Adaptability", which go to the quality and relevance of education, are only canvassed in the objects provision of the *NSW Education Act* and in similar legislation of other States.

"Acceptability" and "Adaptability" in legislative measures

Legislative measures in relation to "Acceptability" are notable omissions from the statutory schemes. In NSW legislation, there are no provisions, beyond the objects clause of the *NSW Education Act*, which encompass the acceptability of education. For example, Part 3 of the *NSW Education Act*, which sets out the key elements of the school curriculum, makes specific subjects "core" and "compulsory", thus removing any opportunity for student consideration or acceptance of a syllabus.

The Board of Studies has responsibility for developing syllabuses; Section 14. In the exercise of its functions, the Board is only required to have regard to the resources available for education in NSW Schools: Section 102(3). There is no obligation in Section 102, nor in any other provisions relating to the Board of Studies, on the Board to have regard to student needs nor to consult with students (or their parents) when developing or endorsing a syllabus. Finally, we note that the Constitution of the Board of Studies, set out in Section 100, includes government bureaucrats, representatives of independent and catholic schools, principals, teachers and parents. It does not include student representatives.

The concept of "Adaptability" is perhaps better catered for via legislative measures. The General Comment noted above provides that "Adaptability" requires States Parties' to ensure that education is responsive "to the needs of students within their diverse social and cultural settings". In this regard, we note that Section 10(c) of the *NSW Education Act*, which provides for minimum curriculum for secondary education, states that the curriculum for secondary school children during Year 7 to Year 10 (other than for candidates for the School Certificate) must meet the following requirement:

- ...
- c) *courses of study in a key learning area are to be appropriate for the children concerned having regard to their level of achievement and needs.*

Interestingly, the *NSW Education Act* does not contain a similar requirement in relation to the curriculum for students undertaking the NSW School Certificate or the NSW Higher School Certificate (“HSC”).

The *NSW Education Act* also provides that the Board of Studies is required to develop syllabuses that enable students to be granted TAFE credits; Section 102(2)(h).¹⁶ In addition, we note that technological studies is a key learning area for Years 7 to 10: Section 9.

As noted above some provisions of the *NSW Education Act*, particularly in relation to students in Year 7 to 10 who are not taking the School Certificate, acknowledge “Adaptability” as a requirement in development of syllabuses. Given these provisions it may be argued that some scope exists to extend the principle of “Adaptability” to the curriculum for students taking the School Certificate and the HSC.

(c) Australian Common Law

In the absence of express legislative provisions for “Acceptability” and “Adaptability” in State Legislation, we consider below, by examining two areas of the common law, whether the various State education statutes can be read generally, or the objects clauses specifically, to imply a right to education which is relevant, of good quality, and reflects individual student needs. We note that while judges have increasingly recognised civil and political rights at common law, such as freedom from arbitrary detention, courts have tended to shy away from declaring or implying economic, cultural and social rights (of relevance to this advice), which might entail them usurping an executive function of government, such as allocation of resources.

Tort

An action in tort may arise where one individual commits a wrong or injury upon another. The most significant tort, and the most relevant to this advice, is that of negligence. In order to prove negligence a person must show that they were owed a duty of care by another person and that the other person breached that duty of care, thereby causing them to suffer loss or damage.

It has been generally recognised by the courts that teachers and educational authorities have a duty of care to protect students from reasonably foreseeable risk of injury, by providing, for example, safe environments and adequate supervision for students. Most negligence cases against educational authorities concern school children who have suffered personal injury during school hours,¹⁷ on school excursions¹⁸ and in some cases, outside school hours.¹⁹ The duty of care owed by an educational authority to a student in these circumstances arises from the common

¹⁶ Section 102(2)(h) to develop or endorse, in consultation with the TAFE Commission, syllabuses for courses of study that will enable school students to be granted credits by TAFE establishments within the meaning of the *Technical and Further Education Commission Act 1990*

¹⁷ *Johns v Minister for Education* (1981) 28 SASR 206

¹⁸ *Munro v Anglican Church of Australia* Unreported, NSW Supreme Court, Court of Appeal, 14 May, 1987

¹⁹ *Koffman v The Trustees of the Roman Catholic Church for the Diocese of Bathurst* (1996) ATR 81-399

law²⁰ rather than from statute.

No legal authority exists to suggest that an educational authority owes a duty of care to a student to provide them with an education of a particular standard and quality (i.e. “Acceptable” and “Adaptable” education). While it may be possible, but unlikely, to sustain an argument that such a duty can be implied from the objects provisions of the *NSW Education Act*, it is unlikely that an action in tort would succeed given the difficulty of identifying damage or establishing loss.

In relation to loss, the courts have generally confined themselves to physical injury and demonstrated economic loss. In this instance, the loss is potential economic loss arising from a lack of relevant or quality education and on a current review of common law principles is unlikely to be sustained.

Administrative Law

The administrative law remedy which would be most apt in the context of this advice is the writ of *mandamus*, an order issued by a court to compel a public official to perform a public duty. It should however be noted that “mandamus goes to compel the performance of a duty, not simply to enforce a right.”²¹

The writ of *mandamus* requires an individual to demonstrate that a public duty is owed. For a duty to be public generally requires that it must be sourced in statute.²² Importantly, the duty must be imposed on a specific public official and not generally on government.²³

As noted above section 4 of the *NSW Education Act* provides:

it is the duty of the State to ensure that every child receives an education of the highest quality.

In the absence of a clear expression that the duty is directed to a specific public official, it will be difficult to persuade a court to issue a *mandamus*.²⁴

Finally it should also be noted that where the duty is vague or broad, courts are unlikely to order *mandamus*. As Aronson & Dyer state:

*It is difficult ... to persuade a Court that an Education Minister is in breach of a Statutory command to “afford the best primary education to all children”.*²⁵

3. IMPLICATIONS OF INCREASING THE SCHOOL LEAVING AGE

Currently, Australian legislation falls short of giving effect to the right to education as provided in international law. While the features of “Accessibility” and “Availability” are generally recognised via legislative measures, Australian law does not recognise the features “Acceptability” and “Adaptability” i.e. a right to education which is relevant, of good quality and reflects individual student needs. In failing to

²⁰ *Williams v Eady* (1893) 10 TLR 41, *Geyer v Downs* (1977) 17 ALR 408 at 417

²¹ *The Queen v. The Commonwealth Court of Conciliation and Arbitration*; ex parte Ellis 90 CLR 55, at Paragraph 9

²² Aronson and Dyer, *Judicial Review of Administrative Action*, p.591

²³ *G.H. Michell and Sons (Australia) Pty Ltd v Minister of Works Bray*

²⁴ Aronson and Dyer, *Op Cit*, at 593

²⁵ *Ibid* at 593

give effect to the essential features of the right to education as set out in the General Comment, Australia may be at risk of violating the ICESCR.

Australian States have to a large degree demonstrated their commitment to the principles underpinning a right to education in relation to “Accessibility” and “Availability” by legislating for free, non-discriminatory and non-governmental education. The objects provisions of the various statutes also reflect a legislative commitment to the right to education which is in the best interests of the child and allows for children to reach their full and unique potential. Legislation also provides for ensuring that the education is of the highest quality.

In our view, however, increasing the school-leaving age will compound the already deficient right of students to an education which is relevant, of good quality and reflects individual needs.

In order to address this deficiency and in the light of extending the school leaving age, specific legislative measures could be enacted to ensure that the principles of “Acceptability” and “Adaptability” are recognised. For example, legislative amendments could be proposed including:

- Permitting student representatives on the Board of Studies.
- Requiring the Board of Studies to consult with students during the development of syllabuses.
- Requiring the Board of Studies to develop syllabuses, which meet individual needs (as is indicated in Section 10(c) of the *NSW Education Act* for students who are not taking the School Certificate).
- Permitting students the right to select the individual subjects which they wish to take in their final year.
- Permitting students the right to include vocational employment as part of their schooling.

Finally, it may be possible to seek an amendment of Section 4 of the *NSW Education Act* to specify that it is the Minister of Education, rather than the State, that has “the duty to ensure that every child receives an education of the highest quality”. This may then open up an opportunity for an administrative remedy, such as *mandamus*, to be invoked, compelling a specific public official to execute the duty to provide education of the “highest quality”. This may further allow for some consideration as to the content of education of the “highest quality”.