Legal Frameworks for Devolution in Regular and Special Education

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Abstract

This paper presents an analysis of legislative frameworks that mandate schools to define their own educational processes and systems. The political implications are discussed and a review is provided of current education law in Australia. An analysis of devolution in Western Australia is related to the need for effecting equality of regular and special education. It is contended that few countries have developed an appropriate legal framework for devolution for both regular and special education. It is argued that new education laws are essential to promote equity in restructured systems.

The trend towards decentralisation and the increase in school level autonomy has been gathering pace in many Western countries since the mid 1970's. Decentralisation has been seen as an identification with the economic and political shift towards market orientation and economic rationalism. It could, therefore, be construed that decentralisation is an orchestrated restructuring process to provide solutions to economic crises. In Australia this political-economic ideology was promoted in the Quality of Education in Australia Report (Quality of Education Review Committee, 1985).

Will the process of decentralisation have sufficient substance to overcome its long development or will it be a passing phase as economic situations change? To provide a working model for decentralisation regardless of political agendas, many countries have instigated constitutional change to mandate reforms. It is important that law and policy makers in Australia look at these models and where appropriate seek international consensus on educational restructuring. In this paper no clear distinction has been drawn between the processes of decentralisation and devolution. The terms are used interchangably. While there is a theoretical distinction between these terms, currently in Australia there are different interpretation of what is actually occuring.
CAN RESPONSIBILITY DEVOLVE WITHOUT A PROPER LEGAL FRAMEWORK?
Society has determined its order through the concept of law. However, humankind has an adventurous tendency that will at times transcend law to empower individuals further. As Cavanagh et al. (1991) pointed out, "The intractability of change, together with the belief in and the very experience of rapid and significant change, constitute a universal law of our time" (p.24). While such a philosophy may be desirable it does not necessarily provide for equitable educational opportunities for all children in all schools.
A major issue with decentralisation is that educators are not well prepared for this new autonomy. Their understandings of the old legal systems were sketchy enough so that to deal effectively with this new empowerment has problems. A possible weakness lies in the multifaceted nature of education law and the reality that no new piece of legislation can remove completely the existing model. Decentralised systems of education need to be properly accountable (Ranson, 1993). Hoyle (1994) rightly asked the questions, "Who is the boss in site-based management" (p.35)? and, "What happens to the chain of command when shared decision-making is initiated" (p.35)? It is argued in this article that school autonomy can only have meaning if it is supported in law, and that legislative reform is a precursor of decentralisation. A legislative framework that facilitates proper decentralisation will need to address the following areas:

1. That schools are mandated to define their own educational processes and systems including curricula. In this legal framework, the former central authority no longer controls professional matters.

2. That teachers, together with parent and community groups, are considered, under the legislation, as the foremost decision-making body of the school.

3. So that teachers do not become too powerful in the new devolved structure, advisory or governing bodies may be set up (so what's new!).

4. That the position of traditional school superintendents (or inspectors) should change with the new advisory bodies.

5. That while teachers may be more empowered in the new devolved systems of education, in reality their powers are still defined by law. Teachers cannot move outside their mandate.

Further to this point it is by no means certain that the majority of teachers have embraced the concept of decentralisation with enthusiasm. Teachers are split on this issue and many feel threatened by the new freedoms and relationships (Fidler, 1989).

THE AUSTRALIAN LEGAL PERSPECTIVE
The states and territories in Australia maintain highly centralised education systems. Recently, though, the moves towards decentralisation in Australian education have been gathering pace. Australian education systems are beginning to shift some responsibility in the direction of teachers, parents, students and the local communities, albeit at a slow pace. To properly understand the complexities of devolved legal frameworks, the current legislative basis for education in Australia should be appreciated. Birch (1993) referred to the subsets of school law as: Constitutional law; Criminal law; Negligence/Malpractice (Torts); Employment law; Civil rights law; Administrative law; Family law; and Appropriation law. Birch (1993) pointed out further that the administrative authority in Australia is usually held by a Minister of the Government below whom is a diminishing chain of authority down to the classroom teacher. "The order of authority is clearly a matter of concern to educational planners as knowing who has power to do what is an essential aspect of effective planning" (p.50). This traditional framework of Minister, through Director-General may change under new legal models.

Devolution of responsibility to school-based groups will involve not only principals and teachers in decision-making but also parents and local community advocates. Although different legal frameworks exist in the states and territories an interesting variation in law has occurred in New South Wales where a 'Conscience Clause' was included in the new education legislation (Education Reform Act, NSW, 1990). This Act devolved responsibility by providing a conscientious objection clause which empowered parents to withdraw a child from a course or curriculum unit on a range of grounds. Previously such conditions have only applied on religious grounds. In New South Wales the issue of choice in education was clarified in the Education Reform Act which set provisions for the registration and approval of school systems including parents' rights to educate their children at home. Section 4 of this Act provided a right for every child to receive an education and established that the education of a child is primarily the responsibility of the child's parents. The Act stipulated further that all children should receive an education of the highest quality. Parents' rights in providing suitable education for their children are supported in the New South Wales legislation (at s.4; s.5; s.22; s.71). The Act empowered the Minister to issue certificates of exemption which is very similar to the existing powers of the Minister to allow registration. This properly legislated policy change in the direction of decentralisation and freedom of choice in the New South Wales education system is unique in Australian education law. It may set a precedent for legislative reform in other states.

WESTERN AUSTRALIA
Western Australia (WA) is a vast state geographically and yet the population is very small in relative terms. Demographic issues have specific relevance to the debate on devolution in WA, particularly with
regard to the likelihood that some schools are better placed geographically to operate in a more decentralised mode than are others. The land area of Western Australia is approximately 2.5 million square kilometres while the population of the State is approximately 1.6 million. Western Australia has an annual growth rate of 1.8% and an urban population of 72%. While the official language for schools is English the number of languages and dialects spoken is in excess of 66. Students normally proceed automatically through the grade system in WA schools so most students are placed with age appropriate peers. To give an indication of the distribution of schools in WA, in 1993 the number of primary schools in rural areas was 443 while the number of primary schools in urban areas was 378. There is only one officially recognised one-teacher school in the State as now teachers have a time allowance for preparation (all data quoted in this article were published by the Ministry of Education WA in 1992/1993). These statistics present a picture of great variability in WA schools and in particular they highlight the comparatively large number of isolated schools in the State. For isolated rural schools, devolution may enable teachers, in consultation with their local community, to direct limited resources according to their community needs (Tomlinson, 1994). Conversely, a lack of funds and expertise might curtail local educational aspirations.

The Education Act, WA, 1928, as amended periodically, sets out the framework for managing education in Western Australia. Currently it does not provide a basis for decentralisation. There are plans in motion by the Education Department (formerly the Ministry of Education) to prepare guidelines for new legislation although the plans have yet to be formalised. Considering the vastness of Western Australia and the great variation that exists between schools it is clear that the new legal framework, when proclaimed, will provide for a 'continuum' of devolution. This means that some schools, because of their size, location, or other factors may not be candidates for devolution. Other schools may be completely devolved from central authority. This 'continuum' of devolution for Western Australia, should it eventuate, may work in the following way. First, there will need to be general powers of delegation in the new legislation. Second, criteria will need to be established regarding what is to be devolved in terms of staffing, community participation, decision-making and funding. Third, the difficult issue of how schools will become eligible to assume devolved powers must be resolved. Fourth, the way schools interpret the new legislation will determine their commitment to devolution. There is therefore both an managerial and a legal viewpoint related to the process of devolution in Western Australia. The most likely outcome in WA is that in mid 1995 or thereafter, a new legislative framework will be established. The new Education Act will provide the statutory framework for devolution while subsidiary legislation, probably in the form of Regulations, will be applied and gazetted over time. Below the level of subsidiary legislation will be policy development and devolved
practice.
An issue still to be determined in Western Australia is the power of the Minister of Education and how the Minister will delegate his or her powers under the new legislation. Under current law the Minister is empowered to delegate responsibilities to his (sic.) subsidiaries 'other than the power of delegation'. It remains to be seen how the new legal framework will embrace the concept of Ministerial delegation.

HOW WILL DECENTRALISATION AFFECT BOTH REGULAR AND SPECIAL EDUCATION?
Australia is currently moving into line with much of the Western world in developing its education systems through constitutional change. A move towards a devolved educational systems approach will rely increasingly on school-based decision-making groups being responsible for ensuring that the needs of all children within their school are met. Richter (1993) conceded that in the western world, even in countries where decentralised approaches have been mandated in law, policies at the local level vary tremendously. Several issues in relation to devolution are now addressed which will have a significant role in ensuring equitable educational opportunities for all children with or without a disability.

Inclusive Education
The devolution of power towards school-based decision-making groups will have a major influence on the current trend towards inclusive rather than segregated education for children with a disability. The policy of inclusion has resulted from considerable world-wide emphasis placed on the rights of all children, regardless of disability, to receive equality of educational opportunity. The human rights discourse has promoted a trend towards developing laws and recommendations that ensure fundamental rights. While all states in Australia appear committed to inclusion in principle, there are currently no legal mandates to formalise inclusion policies. The Commonwealth Schools Commission Act, Cwlth, 1973, supported new innovations in schools and in particular empowered the Schools Commission to support the disadvantaged in Australian education systems. However, despite this early legislative innovation in the direction of school-based decision-making, Dimmock and Hattie (1994) reported that this legal model was accompanied by a significant increase in bureaucracy at the Commonwealth level. Without the establishment of suitable law to support the devolution of responsibility to local school-based decision-making groups, the inclusion of children with a disability into regular classes will rely increasingly on decisions undertaken by individual schools. Devolution of the responsibility for supporting the needs of all students, including those requiring special education support, has already been moved to the district level in Western Australia (Casey, 1994). This does not guarantee equitable allocation of funding, particularly when supporting legislation is not in place. Legislation should uphold the rights of all children to access educational services on a fair basis. But will these rights be achievable in a decentralised education system? The principle of
distributive justice (Rawls, 1971) requires that decisions made regarding the placement of children with a disability into regular classes are fair and that services are allocated equitably, but with due regard to need (Buchanan & Brock, 1990). Elkins (1992) argued that if social justice and equity goals are to be achieved for all children then 'differentiation without discrimination' is required as a necessary first step. Without appropriate legislation there is no guarantee that resources will be allocated fairly. Distributing scarce resources on the basis of the greatest need requires interpretation. In turn, this may be influenced by the priorities of local communities. Although in Western Australia, the Beazley Report (1984) supported the principle of inclusion for children with a disability, there still remained problems regarding the efficacy of the various educational options available. Beazley also supported greater participation of the community in school decision-making. Subsequently, The Western Australian Government commissioned the Better Schools in Western Australia: A Programme for Improvement Report (1987). This Report was influential in promoting the restructuring of schools, from the perspective of devolution, in Western Australia. The Education Department in WA next re-considered the particular problems concerning the education of students with disabilities, originally raised in the Beazley Report. It initiated a comprehensive Review titled the 'Education of Students with Disabilities and Specific Learning Difficulties' (The Shean Report, 1993). This Report made 61 recommendations to improve services for children with special needs. According to Shean (1993), there was strong satisfaction with the current educational system although there were discrepancies between government and private school systems. In addition, the Report emphasised the importance of retaining the existing range of placement options.

Financial Issues
Devolution of responsibility requires schools to be financially accountable according to their own criteria. To ensure equity of educational opportunity the distribution of resources requires attention to individual needs. In circumstances where funds are scarce Rizvi and Lingard (1993) claimed that, typically, it was the needs of the disabled students that become more affected despite everyone's best intentions. Ashenden (1994) stated on an optimistic note, "Some systems are moving beyond special programs for targeted groups to more comprehensive policies to monitor the achievement of all students and to distribute resources across systems on the basis of need" (p.7). Resource deployment and allocation is an important issue in relation to devolving education systems. Ramsay (1993) asked, should resources be distributed to the system as a whole, to individual schools on the basis of numbers enrolled, or to the students themselves? How can the latter two approaches be considered without the labelling of individuals? Can systems be resourced appropriately without labelling?
Autonomy
There appear to be two conflicting arguments concerning educators' perceptions of control over policy decisions regarding devolution. On the one hand, educators want to retain their own autonomy by making decisions at the classroom level that affect them personally. Conversely, to ensure that policy decisions are equitable there is a need for legislative control. Regarding the policy of inclusion both the United States and the United Kingdom have provided legislation to ensure that its implementation is monitored. According to Pagliano (1988), however, Australians are different to their overseas counterparts in that they do not like to be over-manipulated by law. Galloway (1989) argued that once legislation was adopted in the UK it was the beliefs and values of government ministers and not the teachers that affected the provision of services for children with special needs. The concept of special education and the provision of services was influenced by "political values remote from the classroom" (Galloway, 1989, p. 92). Despite these views it is clear that successful inclusion will depend on quality programs with adequate support, which requires appropriate legislation to ensure equity (Cole, 1988). Gannon (1988) proposed that unless Australia endorsed suitable legislation to support inclusion, together with significant resources, inclusion was unlikely to become a reality for many children with a disability. If inclusion is mandated and schools are obligated to provide for all children, regardless of disability or disadvantage, devolution of responsibility to the local management level will promote greater accountability and greater equity.

Legislation
With the current movement towards decentralised education there is apprehension that this will lead to greater inequality of services for people with a disability (Casey, 1994; Junor, 1991; O'Leary & Sharp, 1991; Wilton, 1993). It is frequently argued that in order to ensure a fair approach to decentralisation, acceptable legislation either is (Deutsch, 1985, Pinet, 1990), or could be (Brouillette, 1993), an essential foundation. However, research has shown that educators in Western Australia feel that each individual teacher should have the right to make their own decisions regarding the placement of a child with a disability in a regular classroom (Forlin, 1994). Given that many educators hold pre-conceived ideas about inclusion, allowing individual choices may not ultimately promote equity in educational opportunities for all children. Conversely, using legislation to force educators to accept inclusion about which they hold many concerns may also lead to inequality.

In support of students with a disability, legal frameworks are being established in western democracies in order to promote equal learning opportunities. In the USA, Levin (1993) argued that students with a disability have a constitutional entitlement to be provided with
special services because they may not be able to benefit from the services of the regular classroom (Education for All Handicapped Children Act, USA, 1975, Public Law 94-142). American schools that wish to receive federal finance in order to accommodate the requirements of children with a disability and provide them with an 'appropriate public education', must comply with the law. The USA legislative framework is designed to ensure that all children receive equal educational opportunities. The concepts of equal opportunities and equal access to the curriculum have been advocated by those who regarded the legal framework of PL 94-142 as appropriate. However, despite the best constructed models for decentralisation, should the appropriate support not be available, the needs of all students will not be met.

In the United Kingdom the Local Education Authorities (LEA's) have survived the transition towards decentralised education systems. One of their major functions is to oversee the requirements of children with special education needs. The LEA's also function in the areas of student welfare assistance, school transport for children who need this service, and various youth services, among other functions. There are therefore constitutional issues in the United Kingdom to be addressed so that devolved systems can operate effectively while ensuring that the new agencies operate for the benefit of all. A significant problem in Australia with regard to decentralisation is the possible inequality of services for people with a disability. Only properly developed law may ensure that adequate services are provided in devolved education systems (see Education Reform Act, UK, 1988; and Education Act, UK, 1993). A real concern is the potential for an uneven distribution of resources, including personnel, between different regions and authorities. As Fullan (1993) stated, "Centralization errs on the side of over control, decentralization errs towards chaos" (p.37).

The argument proposed in this article is that decentralisation may only work effectively through a coordinated properly legislated approach. Simultaneously, the devolution of financial management to individual schools, without proper accountability frameworks, may lead to greater inequality of service provision for children with special needs. The right to education for children with a disability, unless protected in law, may become confused with the needs of communities and schools rather than the child's needs. Legislating for inclusion, while at the same time mandating a devolved educational system, requires a high degree of commitment by educators and politicians to ensure that the necessary financial support is available. In a climate of educational constraints a move towards inclusion in a devolving system does not appear to auger well.

It is proposed that a framework for decentralised education in Australia, which addresses the needs of regular and special education students, should include the following objectives:

1. All individuals have an equal right to education and equal opportunities should exist at all levels of the education system.
2. School organisation should be organised democratically in a process that involves everyone affected by the system.

3. The legal framework should set out the rights and responsibilities of everyone within the system.

4. Adequate financial support is required as a basis for implementation.

5. Incentive structures within a school should be in place so that educators in a devolved system will proceed in a fashion supportive of the goals of the school.

6. Systems should be developed in a way that empowers individuals to seek redress.

Further to point five, the issue of redress is one that creates anxiety in the domain of special education. The rights of appeal against a variety of decisions concerning children with special needs can often become confused in drawn out bureaucratic proceedings. It has been demonstrated in the UK that appeal bodies are reluctant to undermine the decisions of head teachers on appeal issues involving special needs children (Russell, 1990).

CONCLUSION

In Australia the inclusion of children with a disability has been promoted increasingly in regular schools but economic and political circumstances have been used as excuses for a lack of action in this area. Devolved systems should be developed on the need to consider every facet of education including an emphasis on all children. The special needs of children in devolved education systems will only be catered for if such systems are accountable. New education laws are being constructed in Australia. What concerns us now is that on behalf of educators who were inspired by the philosophy that underpinned US Public Law 94-142, it is unlikely that the new legal frameworks will facilitate a similar model in Australia. The new laws in Australia, while tinkering around the edges of special education issues, deal primarily with regular education systems. In particular, the new legislative frameworks mandate the decentralisation and restructuring of schools and school systems in the context of better management, but how will this improve the education of children with special needs?

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