

ANZELA



AUSTRALIA AND NEW ZEALAND EDUCATION LAW ASSOCIATION

ANZELA NZ Update March 2018

From the Chair

Dear Members - welcome to the first *Update* for 2018.

2018 is shaping up as a busy year for ANZELA in New Zealand. The committee has already had a strategic planning day in February and, amongst the outcomes from that day, was the development of an exciting initiative approved by the 2017 AGM. Members have been told in a separate email that the New Zealand Chapter of ANZELA has agreed to fund or partially fund members' attendance at relevant courses and conferences or to support appropriate research projects. The maximum grant will be \$2,000 but lower amounts may be offered.

The approval of grants will be subject to the criteria set out in the application form and to the availability of funds. The application form was attached to the earlier email but anyone who did not receive it or can no longer find it, please contact Jane Battersby and she will resend it to you. It will also be on the ANZELA website in due course. There will be two funding rounds a year and in 2018 these will close on 30 March and 30 October.

The other major commitment for the New Zealand Chapter this year will be to support the annual conference in Cairns. The 2018 conference is being convened by the Board rather than a local chapter so New Zealand has agreed to take responsibility for a specific portfolio. We will be managing the paper proposal; paper selection; and programme planning aspect of the conference so please ensure we have a good supply of New Zealand proposals to choose from!

We are fortunate to have, as always, some very interesting contributions to this March *Update*. Rachel Schmidt-McCleave, who is a member of the NZ executive committee, has provided a useful and timely update on workplace Health and Safety law, and there is a profile of Professor Sally Varnham, a previous president of the NZ Chapter, who has longstanding commitment to recognising the student voice in education. Included in the profile of Sally is an update on her current and significant research project into student engagement in the Australian tertiary sector.

On behalf of your New Zealand ANZELA Chapter committee, we wish you a relaxing and enjoyable Easter break and we look forward to reading your conference paper proposals following the deadline for submissions on 13 April.

Warm regards

Virginia

A handwritten signature in cursive script, appearing to read 'Virginia', written in black ink.

Update on workplace health and safety law

Cases decided so far under the new law, including approach to sentencing under the new law

WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd [2018] DCR 49 was the first case decided under the HSWA but failed to reveal much in terms of guidance under the new regime. It related to an incident in which a portion of a worker's hand was amputated after it was caught in the auger of a plastic extrusion machine he was operating in the defendant's facility recycling plastic. Budget Plastic pleaded guilty to a charge under sections 36(1)(a), 48(1) and 48(2)(c) of the HSWA, punishable by a maximum penalty of a fine not exceeding \$1.5 million.

The Judge noted that broadly the same approach to sentencing arose under the HSWA as did under the 1992 Act and imposed a fine of \$100,000, reparation and costs.

WorkSafe New Zealand v Rangiora Carpets Ltd [2017] NZDC 22587 is a sentencing decision after Rangiora Carpets pleaded guilty to one charge under sections 48(1) and 2(c) of the HSWA. The case is of much more use in predicting the likely approach to sentencing under the new legislation. The Court noted that the approach to sentencing in the 1992 Act was well-settled as a result of the leading High Court decision in *Department of Labour v Hanham and Philp Contractors Limited and others* (2008) 6 NZELR 79. That case fixed starting points to be generally be fixed according to a culpability scale: low culpability a fine of up to \$50,000; medium culpability a fine of between \$50,000 and \$100,000; high culpability a fine of between \$100,000 and \$175,000.

The Court went onto note that the same broad approach to sentencing is required under the new regime with one modification, namely that the Court now has the ability to make a variety of ancillary orders outlined in Part 4, subpart 8 of the HSWA, including "adverse publicity orders", "training orders" and orders to pay the regulator's costs in bringing a prosecution.¹

The Court stated:

- There have been no material changes in the way in which the Court should go about assessing reparation under the new Act. Reparation is a principal focus in the sentencing process and serves a distinct purpose to a fine. That being so, \$18,000 in emotional harm reparation is justified in this case, plus \$2,000 to compensate the victim for the travel insurance excess she was forced to pay in cancelling a trip.²
- The Court rejected WorkSafe NZ's submitted approach that there only be three or four culpability bands for the assessment of a fine. The Judge considered "further stratification is required in order to assist with meaningful placement of offending within the available sentencing range of \$0 to \$1,500,000. Further, the enormous potential variation in corporate offenders and their ability to pay needs to be capable of recognition when it comes to sentencing. Therefore, the following bands should apply in the Judge's view:³

¹ At [14].

² At [17] – [20].

³ At [34].

| Culpability Band | Fine |
|-------------------------|--------------------------|
| Low | \$0 to \$150,000 |
| Low/Medium | \$150,000 to \$350,000 |
| Medium | \$350,000 to \$600,000 |
| Medium/High | \$600,000 to \$850,000 |
| High | \$850,000 to \$1,100,000 |
| Extremely High | \$1,100,000 + |

Use of enforceable undertakings

Enforceable undertakings are essentially promises that are enforceable in court and are a regulatory tool used for some time in other regulatory regimes.

In the health and safety context, they can be “offered” to WorkSafe NZ by an individual or company who has breached, or allegedly breached, the HSWA or regulations.⁴ The giving of such an undertaking does not constitute an admission of guilt by the person giving it in relation to the contravention or alleged contravention to which the undertaking relates.⁵

Enforceable undertakings are designed to secure quick and effective remedies for contraventions, without the need for court proceedings, and provide the potential for constructive and non-adversarial solutions to compliance concerns. Rather than imposing a pre-determined set of penalties, enforceable undertakings allow WorkSafe NZ and the relevant organisation to come up with constructive solutions.

To date, WorkSafe NZ has accepted eight enforceable undertakings.⁶ In the schools context, WorkSafe NZ accepted an enforceable undertaking from St Kentigern Trust Board: On 6 April 2016 two students received throat lacerations from a razor blade during a school production. The school’s undertaking included dissemination of information, preparation of a performing arts health and safety policy, engagement of an external consultant, and various training courses including at an industry level (total expenditure of at least \$85,682.88).

Amendment Bill

Finally, the most recent update to note is the introduction of the Private Members Bill, the Health and Safety at Work (Volunteer Associations) Amendment Bill 2018 on 22 February 2018. That Bill, if passed by Parliament, would amend the HSWA to allow volunteer associations that employ a person or persons for not greater than 100 hours per week to be excluded from the definition of a PCBU. Currently having any employee excludes an organisation from being a volunteer organisation and so they become covered by the HSWA. Watch this space to see how the proposed amendment gets on.

Rachael Schmidt-McCleave, Barrister, Central Chambers, Wellington

⁴ HSWA, section 123(1).

⁵ HSWA, section 123(3).

⁶ <https://worksafe.govt.nz/laws-and-regulations/enforceable-undertakings/accepted-enforceable-undertakings/>

Member Profile and Research Update

Prof Sally Varnham

Sally has a long standing interest in issues of law and policy affecting all sectors of education. She is a dedicated and long term member of ANZELA having been a Director, President and member of the New South Wales and New Zealand Chapter committees. She previously worked as a Senior Lecturer at Massey University on the Wellington campus and took up a position with the Faculty of Law at the University of Technology Sydney in 2007. Now a Professor of Law, she has expanded her research from New Zealand to include education, law and governance in Australia, and she has a wide network of education law colleagues in both countries and internationally.

Sally has always had a deep interest in student voice in education, not only for the benefit of schools and tertiary institutions but importantly to assist in the development of the critical skills needed for citizens of a democratic society. Her roles at UTS as a Student Ombud and Chair of the University Academic Board, caused her to consider the role of student engagement in institutional decision-making, and how and why student voice may be more effectively and authentically embedded within processes to assist in enhancing course quality and the student experience, and the professional development of students.

In 2014 she began with funding through the Professional Experience Program at UTS to investigate tertiary sectors abroad which had embedded processes for student partnership from co-creation in the classroom, to university governance and strategy. This included England with its student engagement partnership (TSEP), student partnerships in quality Scotland (sparqs), the European Students Union, and importantly the work in New Zealand being undertaken by the New Zealand Union of Students' Associations.

Sally then obtained funding from the Australian Government Office of Learning and Teaching (OLT) pursuant to a Strategically Commissioned Priority Project grant to investigate existing student engagement across the Australian sector. In 2016 she was awarded a National Senior Teaching Fellowship originally by OLT but then through the Australian Department of Education and Training. This Fellowship has enabled a national sector wide collaboration involving input from student leaders and university personnel from professional staff to senior managers. She undertook also a wide process of dissemination working with universities and student leaders, speaking at conferences and running workshops in institutions across Australia. At the same time the work has been hugely assisted by collaboration with NZUSA and the New Zealand Academic Quality Agency (AQA), sparqs and the most recent National Student Engagement Program in the tertiary sector in Ireland, just ahead of Australia in embedding student partnership in institutions and nationally.

The Fellowship has developed a Framework for student partnership known as STEPUP for quality enhancement, and a set of principles to assist institutions in facilitation of processes.

All of the work including the Project report, the Framework and Principles, and Sally's weekly blogs may be found on www.studentvoice.uts.edu.au.

Sally says "I cannot overstate the role ANZELA has played in this and all my work in education law and policy. Its members, and the connections I have made through them with national and international colleagues, the conferences and the journal have been hugely influential in the development of my research. Research in this area is nothing without impact on the real world of learning and teaching and the strength of ANZELA is its essentially practical character and its huge diversity of membership."

This project continued a collaborative investigation into the case for a more systemically inclusive student voice in decision-making and governance in Australian universities. This investigation was driven by the need for a deep consideration of the meaningful and effective engagement of students' views at all levels and of all cohorts, and how this may enhance the quality and standards of the institution and the student's university experience. It drew on international experience and current practice in Australia to ask:

- What is 'student engagement' leading to 'student partnership' in university decision-making?
- Why may student engagement processes warrant consideration in today's higher education environment, in terms of value to universities, their students and to the sector as a whole?
- How may student engagement be embedded most effectively in university policies and processes to enable the development of a culture of student voice?

Higher education in Australia is increasingly multi- and trans-disciplinary with a drive towards student-centred learning. There are projects underway which follow the developing trend in comparative higher education sectors – in the UK, Europe and New Zealand – towards practices and processes which embrace 'students as partners' in learning and teaching. This is accompanied abroad by consideration of the part played by engaging the student voice inside as well as outside the classroom in university decision-making and governance. An emerging body of research internationally points to the benefits for universities, in terms of enhancement of quality and standards, and for students in their university experience and their development as critical thinkers, innovators, leaders and citizens. Sector-wide collaboration in the UK led to the formulation of principles contained in the National Quality Code for Higher Education (Chapter B5) and the formation of The Student Engagement Partnership (TSEP); and in Scotland, the establishment of student partnerships in quality Scotland (sparqs) and development of the Student Engagement Framework. In Australia, there has been a dearth of research which focuses on student engagement in university decision-making and governance, and how it can contribute to good practice.

All Australian universities have some formal representative systems which enable students to have input into decision-making and governance. Anecdotally from discussions with leaders in the sector, for example chairs of Academic Boards and Senates; feedback following seminar and conference presentations; and interaction with university managers, students and student bodies, there is a feeling that we could do more. The project showed that a range of Australian universities are working in this area, providing instances of exemplary practice and commitment to further initiatives to embrace the student voice in a wide range of university functions.

The project drew on international experience and evolving examples of good practice in Australia to stimulate a conversation about student representation.

This report is part of a set of four publications produced by Professor Varnham and her team that explore and promote the benefits of student engagement in university decision-making and governance. The other publications are a report on international investigations, a good practice case-studies report and a survey report.

The project approach

Engagement of the higher education sector players in examining student participation in universities, building on recent progress, was essential to the central aim of the project.

Phase 1: International research in student engagement in higher education

Providing a foundation and fully incorporated into this project was the compilation of international approaches to student engagement in tertiary institutions. The work was undertaken in early 2015 by Professor Sally Varnham with support from the University of Technology Sydney's Professional Experience Program. It included:

- analysis and synthesis of international project reports, in particular, the Bath University/Quality Assurance Agency (UK) (QAA) project and Good Practice Guide, student partnerships in quality Scotland (sparqs) '*Celebrating Student Engagement*', and the Ako Aotearoa/New Zealand Union of Students' Associations (NZUSA) Report '*Student Voice in Tertiary Education Settings*' (all 2013/14); and UK agency and government reviews of higher education institutions.
- Semi-structured interviews and focus groups were conducted with top-level sector personnel and student representatives in the UK, Europe and New Zealand.

The project funded the publication of the research report, *Report on international research findings on student engagement in higher education, 2015*, (Varnham et al 2017) It provides a description of student engagement approaches by international institutions and higher and further education systems.

Phase 2: Australian research and review

This phase collated details about the Australian experiences of student engagement in higher education and universities. It entailed researching university policies and processes, and surveying senior managers of universities and private institutions, as well as student leaders at Australian universities.

Phase 3: Case studies and a pilot study

Building on the earlier phases, phase 3 gathered detailed examples of student engagement in university decision making. These case studies aimed to provide understanding and knowledge of practices occurring in Australian universities, with the intent to highlight pockets of good practice.

Dissemination and impact

Phases 2 and 3 yielded detailed descriptions of universities' engagement of students in higher education governance and decision-making. The research findings and case studies provide a useful snapshot of practice in Australia in 2015 and 2016; they are published as companions to this project report to inform current discussion and future work in the area of 'student voice'. The publications are entitled, *Understanding student engagement in university decision making and governance 2015 and 2016 – project survey findings* (Varnham et al, 2017) and *Understanding student engagement in university decision making and governance 2015 and 2016–Good practice case-studies report – Australian examples of student engagement* (Varnham et al, 2017).

The findings from phases 1 and 2 were used early in the project, including as a basis for discussion at the project's student engagement workshop conducted on 27 October 2015. This workshop involved both students and university personnel in productive dialogue. One outcome of the workshop was the identification of the factors needed for effective student engagement to become embedded in and integral to the operations of institutions. These factors replicate the themes from international and Australian research.

The project's findings were presented at conferences, workshops, in The Voice publication (the Newsletters) (www.studentvoice.uts.edu.au at resources), and on this website and our Facebook

pages. At first this aimed to raise awareness and engage the sector. Later dissemination was more targeted and involved active engagement by personnel from universities and students in a student-engagement conversation. A large-scale national forum on 5 September 2016 marked the end of the project. It involved invited international and national speakers, and two sessions were facilitated by Australian and New Zealand students – putting into practice the student partnership approach.

As this investigative project ended its project leader Professor Sally Varnham commenced her National Senior Teaching Fellowship. Through the fellowship Professor Varnham will undertake a collaboration between tertiary education leaders and institutions to create a National Framework for Student Partnership in University Decision-Making and Governance. Engaged dissemination will be used to support this objective or 'next-step' in the development of 'student voice' approaches in Australian tertiary education.

Important project findings

What is meant by 'student engagement' and 'student partnership'? The wide range of interpretations and implications of these terms made it crucial to establish definitions to frame this work. The project considered 'engagement through representation' and 'partnership through engagement' to distinguish the focus from work which is primarily concerned with a student's engagement in their own learning. It recognises, however, that in considering the university as a community of learning, all engagement is inevitably intertwined. For the project's purposes, engagement involves authentic inclusion of student views in university operations through both formal and informal mechanisms, particularly representative structures. To encourage students to engage, they must see that their voice can make a difference. A perception of 'tokenism' acts as a deterrent to voicing views.

Why is student engagement important to the student experience in today's higher education environment? The impetus for the project was the experience of its leader in university deliberative bodies and consensus with other academic board chairs that the sector could improve, informed by developments in the UK, Europe and New Zealand. The project considered international processes which enable students to play a purposeful role in the 'development, management and governance of their institution, its academic programmes and their own learning experience' (HEFCE, 2013). Importantly, there was consideration of the mounting body of evidence highlighting the benefits of effective student engagement for the enhancement of quality and standards in universities, and for the personal development and arguably the employability of students. From an analysis of published reports and reviews, and a series of interviews and focus groups involving a range of stakeholders in the comparative jurisdictions, it was possible to get a clear indication of what works for the benefit of the university, individual students and the sector as a whole.

How can student engagement be included in university policies and processes to embed a culture of a student voice? Key themes were identified from a comprehensive analysis of the international research and the components were mirrored in the Australian research. It has been clearly demonstrated that to encourage engagement, a sincere culture of partnership must be developed through demonstration by universities and the higher education sector of a commitment to and respect for the student voice. Communication is central: first, of the representative opportunities across the institution; and second, how the views of student representatives are integral to decision-making. Essential components are:

- effective, valued and supported student leadership in partnership with universities;
- a developmental approach to student representation from course/subject level upward

- resources for training and support; formal and informal processes for the engagement of students at all levels for continual enhancement of courses, their university experience and their personal development;
- capturing every student's voice to ensure engagement of the whole student cohort;
- considering the provision of meaningful incentives for student engagement and representation.

A national entity supporting student engagement is key to sustained development of student partnership.

Recommendations

The project recommends a sector-wide collaboration framed by these essential components in the Australian context. It should consider the benefits and challenges of student engagement in the Australian sector with its wide diversity of types of institutions and student cohorts. The project uncovered considerable interest in the sector with many institutions now giving priority to creating a culture of collegiality and partnership. It is timely to build on this momentum to develop common understanding of 'student engagement and partnership', to share knowledge and experience, and facilitate innovation of institutional processes. This need is recognised by the granting of an Australian Learning and Teaching National Senior Teaching Fellowship to the project leader, Professor Sally Varnham (2016–17). The Fellowship will involve collaboration of senior university leaders and government policy-makers, student representatives, professional and academic staff, university management, and government agencies, towards development of principles and a framework to assist in this development.

Alan Knowsley, Rainey Collins Lawyers, Wellington – editor of the ANZELA Update