EDITORIAL

Before introducing the articles for this issue, IJLE and ANZELA would like to express sincere appreciation for the valuable contribution and development of this journal through the great efforts and professionalism of the immediate past co-editorial team, Professor Joy Cumming and Dr Elizabeth Dickson. Joy and Elizabeth have contributed as authors and co-editors over the past eight years. Joy and Elizabeth succeeded Katherine Lindsay and commenced co-editing the Australia & New Zealand Journal of Law & Education and published the first issue (10(1)) in 2005 and continued until the last issue (17(2)) in 2012. Their persistent journey, supported by the sterling editorial assistance from Donna Bennett & Stephanie Hodgson at Office Logistics, published 89 articles, 4 book reviews, 4 case notes, and a commentary on law and education resources within the 15 previous issues. Joy and Elizabeth were the spearheads of the title change of this journal from the Australia and New Zealand Journal of Law & Education to the International Journal of Law & Education. The IJLE is honoured that Joy and Elizabeth are continuing their involvement as members of the editorial board.

The IJLE reflects the breadth and importance of education law issues. In this issue our authors cover a diverse array of education law issues important to school and higher education and society in general.

Protection of minority groups in Australian education institutions has received infrequent attention. This is not so in other jurisdictions as seen in the first article in this issue. Ralph Mawdsley's article 'Diversity, Affirmative Action, and Higher Education'[1] concerns the protection of minority groups in the United States. The article's focus is on the Court's interpretation of the 'Equal Protection Clause' of the US Constitution's Fourteenth Amendment declaration that 'no state shall ... deny to any person within its jurisdiction the equal protection of the laws'. The article starts with a discussion of the leading authority *Brown v Board of Education* and notes that, 'once de jure segregation had been eradicated, school districts were under no obligation to remedy any imbalances caused by demographics'. The article reviews subsequent cases 'addressing whether the use of race-conscious admissions standards to increase diversity among students violated the Equal Protection Clause'. The article examines the application of this law to the university setting and how the Supreme Court's view on diversity as admission criteria are likely to influence the Court's decision in *Fisher v University of Texas* in 2013.

Negligence from bullying and harassment by other pupils at high schools was an issue that came before the New South Wales Court of Appeal in *Oyston v St Patrick's College* [2013] NSWCA 135. In that case the Court accepted that risk of psychological harm from bullying was both foreseeable and not insignificant within the meaning of s 5B of the *Civil Liability Act* 2002 (NSW). Bullying is not limited to the school grounds and schools' exposure to negligence through cyberbullying is a growing concern.[2] This is a pressing issue across jurisdictions. Kathleen Conn's article 'Cyberbullying in American Higher Education: Litigation Challenges and Recommendations'[3] notes that 'while most of the media and research attention is focused on the problems in K-12 schools, both bullying and cyberbullying are also present in tertiary schools, including professional schools'. This article identifies the characteristics of cyberbullying generally and addressed the 'legal challenges American students face in the higher education setting … when attempting to ascertain the identity of anonymous cyberbullies'. The article

also reflects upon the conflicting decisions in American courts when administrators in higher education institutions attempt to discipline cyberbullies and makes some recommendations 'for curtailing cyberbullying in higher education in the American setting'.

Choice of school is an important consideration for parents and children. In family disputes a continuing source of conflict is disagreement on choice of schools that the child/children will attend. In family law matters the choice of school may be determined by the court.[4] The next article, Joy Cumming and Ralph Mawdsley's 'The Prevailing Voice in Choice in Schooling: The Balancing Rights of Parents, Children and the Courts',[5] considers the 'rights of parents and children to determine schooling choice in Australia and the United States of America (US)'. The article notes parents, in both countries, are given clear but limited rights to 'direct the education of their children'. Children also have rights and the article examines the rights of children to educational choice and this article also examines the Family Court's involvement, within the context of family breakdown 'in curtailing rights of parents to determine schooling for their children'. The article notes that both countries adopt the 'best interests of the child' as the paramount consideration and examines the factors the courts consider to determine the best interests of the child when addressing educational matters including quality of schooling.

The last few years have been difficult for Australia's international education and 2013 has seen a refocus on strategic vision, in the form of the Chaney Council Report, *Australia - Educating Globally*, to assist the redevelopment of a vibrant Australian international education sector. The International Education Association of Australia (IEAA), representing Australia's peak education bodies, has called for action for the International Education Industry, including transnational education. John Orr's article 'Australian universities: transnational education arrangements and liability in partnership law'[6] notes that while many Australian universities have established transnational educational ventures in various commercial forms the legal status of some of these arrangements are not well understood. This article 'examines the legal relationship between Australian universities and partner offshore institutions in providing education services in collaborative transnational arrangements and investigates complex technical questions regarding whether these arrangements could give rise to legal liability in partnership'. The article concludes that 'in appropriate circumstances, it would be open to a court to find that a transnational arrangement between an Australian university and an offshore higher education institution is an arrangement between 'persons' who are carrying on a business in common with a view of profit and satisfy the legal status of partnership. The significance of a transnational education arrangement being a partnership is that an Australian university may find itself with unlimited liability for the business of the arrangement'.

Recently, on 15 March 2013, 'schools across Australia participated in the National Day of Action Against Bullying and Violence [aimed] … to strengthen their everyday messages that bullying and violence at school are not okay at any time'.[7] There is a pressing concern that 'violence in Australian schools continues to rise'[8] and recent headlines resound the concern with 'Principals often victims of violence in schools'.[9] The final article by Clem van der Weegen, 'Defining 'Reasonable Force' In the Modern School Environment'[10] is, in part an address to these concerns. Van der Weegen notes the 'perception in the wider community that there are increasing incidents of violence in the modern school environment' and a real confusion exists 'among 'frontline' teaching staff as to their legal powers'. The article argues that the confusion 'is a result of a tension that exists between, on one hand, the common law duty of care that teachers owe to protect students from harm … and, on the other hand, a failure of school administrations in their duty of care to their teachers by informally promoting a 'hands-off' culture'. The article

recommends reform and proposes 'Australian education authorities consider implementing uniform national guidelines similar to those recently enacted in England and Wales governing the use of force to manage or control students.'

This edition, like many before it, comes about by the work of many. The editorial assistance team, Donna Bennett & Stephanie Hodgson at Office Logistics, deserves a special word of appreciation for both skill and professionalism. The IJLE would also like to thank all the reviewers for their contributions enabling this splendid issue.

Endnotes

1 Ralph Mawdsley, 'Diversity, Affirmative Action, and Higher Education' (2013) 18(1) *International Journal of Law & Education* 7.

2 See Michael Inman, Schools could be sued for cyber bullying: experts (online) 15 August 2013 <http://www.canberratimes.com.au/technology/technology-news/schools-could-be-sued-for-cyber-bullying-experts-20130814-2rx8u.html>.

3 Kathleen Conn**,** 'Cyberbullying in American Higher Education: Litigation Challenges and Recommendations' (2013) 18(1) *International Journal of Law & Education* 21.

4 See for example *Crabman & Crabman* [2013] FamCAFC 104.

5 Joy Cumming and Ralph Mawdsley, 'The Prevailing Voice in Choice in Schooling: The Balancing Rights of Parents, Children and the Courts' (2013) 18(1) *International Journal of Law & Education* 39.

6 John Orr, 'Australian universities: transnational education arrangements and liability in partnership law' (2013) 18(1) *International Journal of Law & Education* 57.

7 See <http://www.bullyingnoway.gov.au/national-day/>.

8 Luke Adams Foundation, *Violence in Australian schools continues to rise (online)* 16 May 2013 <http://thelukeadamsfoundation.org.au/?p=1123>.

9 Josephine Tovey and Benjamin Preiss, Principals often victims of violence in schools (online) 23 July 2013 <http://www.smh.com.au/national/principals-often-victims-of-violence-in-schools-20130722-2qevg.html>.

10 Clem van der Weegen, 'Defining 'Reasonable Force' In The Modern School Environment' (2013) 18(1) *International Journal of Law & Education* 83.

John Orr