EDITORIAL

Over the last six months we have received a strong flow of articles for the *Australia and New Zealand Journal of Law and Education*. Our reviewers in Australia, England, New Zealand, South Africa and the USA have been busy reviewing papers on a wide variety of education law topics and we thank them for their continued diligence and professional contributions to the journal. Their constructive advice to authors has enabled us all to enhance papers and to ensure that the journal maintains a strong academic and practical content, credible to our wide range of readers.

Reviews and revisions of papers take a little time. Because of the substantial number of papers that authors have now polished to publication-readiness, we are publishing a joint issue, 2005 Issue 2 and 2006 Issue 1.

The papers cover a full gamut of concerns and issues for education and law. They reflect the growing international awareness of similar issues. The international representation of authors in the journal, and the issues addressed, reflect the growing number of international participants at the Annual Australia and New Zealand Education Law Association Conference, which this year will be held in October in Hobart, Tasmania.

We come together at ANZELA to learn from each other. We hope as Editors that the international flavour of many of our papers also provides stimulus for looking at law and education with a different lens. Often it is only by stepping outside our own familiar environment that we discover what is unique about our situation, and what is common with that of others.

Robert Guthrie's article, *Teachers and Stress*, addresses an issue that is always of importance in education. In Australia and internationally, teachers are often in the public eye as the major facilitators of children's formal education. At the same time as they must deal with official structures and changes, teachers must remain focused on the central purpose of their work with children in schools. As Guthrie notes, workers in the education industry produce the highest percentage of stress claims in workers' compensation claims in Australia.

Guthrie's paper provides a very comprehensive and thought-provoking exposition on the nature of stress in teachers' work. It examines the nature of research on stress from both psychophysiological and legal perspectives and the legal framework for stress claims in Australia, as well as the nature and incidence of claims in a number of comparable nations to Australia. He also provides a state by state analysis of the nature of claims in Australia. Costs of stress claims absorb financial and human resources that could be used more beneficially to promote educational outcomes for children. The analysis by Guthrie of why stress and stress claims may be more prevalent for teachers than workers in other areas may give pause to policy makers and school leaders about the rate of change promoted in schools and the industrial and classroom environments in which teachers may often be working.

Education is one of Australia's largest export industries, with international students studying in Australia, and Australian universities, and schools, providing offshore education to students who remain in their home countries. In 2002 to 2003, for example, exports of international education services generated $4.2 billion in income for Australia, 'more than wool, wheat and beef in terms of value'.[1] The article by Jim Jackson is timely and significant in addressing the issue of regulation and quality assurance in international education for Australia and New Zealand.

We note a growing trend in Australia to claims by students who believe that a program is not offering what was promised or that they have not been instructed with the quality they were led to expect. Educational organisations can be found responsible and face damages claims. Poor quality control can lead to organisations losing registration.

Through his detailed discussion of the *Education Services for Overseas Students Act 2000* (Cth) (ESOS), Jackson demonstrates the ways that organisations can ensure compliance and act in responsible and professional ways. Most importantly for Australian organisations, Jackson notes that the Commonwealth law operates in conjunction with State law—inappropriate action in one State can lead to deregistration across Australia and conversely, organisation must comply with requirements for registration and quality control in each state or territory. Jackson's article also explores possible legal responsibilities other than by statute, such as in contract law and responsibilities under the *Fair Trading Acts* of Australia and New Zealand. Any school or agency involved in international education in Australia or overseas may find Jackson's article practical and helpful in considering their compliance with the various acts and the appropriateness of their quality control procedures.

Jackson concludes his article with a citation from the case *Wu, Mr Ying Ching*,[2] and the comments of the Presiding member Mr Hurley. Mr Hurley stated that there has been little consideration of students' rights in the provision of international education and that neglect of students' rights could have a negative impact on the education industry.

Children's rights and students' rights are the focus of the companion pieces by Ralph Mawdsley and Joy Cumming, and more specifically, issues that could arise when children's rights in education might conflict with parents' rights. In the first of the two papers, the discussion focuses on ways in which children's rights have emerged through case law in the USA, building on the fundamental rights established through the Bill of Rights and the US Constitution. The USA has a very different educational structure to those of Australia and New Zealand, with more local and community governance of many aspects of provision including curriculum. However, as the article shows, there has been a gradual erosion of parents' rights and a growing issue of the independence of children's rights. Some of the most interesting commentary has emerged from the dicta of Justice Douglas in the well-known Amish case, *Yoder*.[3] Justice Douglas considered the well-being of the student should have been considered through the child's own voice, not that of parents and other adults. More recent court decisions in the USA raise issues about school notification to parents on a number of student matters, and where students' decision-making rights might be superior to those of parents. A series of federal statutes address this issue to an extent, but do not at this stage resolve the growing dilemma of the autonomy and capacity of the child to make decisions in their own best interests.

The USA is not a signatory to the UN Convention on the Rights of the Child (CRC) while Australia and New Zealand are. The second paper by Cumming and Mawdsley analyses the impact of the CRC and of the basic principles of 'best interest' and 'evolving capacity' on children's rights in Australia. Most interestingly the analysis shows that recognition of children's rights to engage in decision-making or to be considered responsible and accountable for their actions, independent of their parents or other adults, has emerged most clearly in non-educational law. For example, the reforms of the *Family Law Reform Act 1995*, medical law, privacy and criminal law contrast strongly with recent education legislation at the federal and state levels in Australia. This article concludes with some reflection on why children's rights are not recognised in education law, and whether a cultural valuing of a 'common good' may be prevailing over individual rights.

We hope both papers are thought-provoking in examining education policy and legislation and the way in which the individual child is empowered to act within education.

Privacy legislation is the focus of the article by Joan Squelch and Andrew Squelch. Focusing mainly on legislation in practice, this article looks at legislation on privacy, the value of webcams in schools to promote a safe and secure environment, and conflicts and resolution. While traditional closed circuit video may have been in place in many schools in Australia, webcams are providing a new option for increasing surveillance for the purpose of improving security. Webcams also offer the possibility of extended observations, for example, for examining teaching performance, or for parents, at home or work, to monitor their child's classroom activities. However, many privacy issues surround the legal use of such technology. What is or what should be the balance between individual privacy rights and the best interests of the community? Who should be the party to give consent to observation? This paper examines such issues with a specific focus on legislation in Western Australia and provides a practical risk assessment for schools. Readers from all Australian states and territories and international readers will resonate with the issues and possible resolutions that are discussed, or consider the ethical balance of the matters raised.

An analysis of freedom of expression and school dress codes touches on similar issues of privacy and individual rights. Ken Alston examines the issues of school dress codes, individual rights and the right to express cultural and religious identity in South African schools, under the framework of the South African Constitution and Bill of Rights. He also briefly examines the construction and interpretation of Bills of Rights in four other nations, New Zealand, Canada, Great Britain and the United States of America, and their impact on the dress code issue. The paper is interesting for Australian readers as, without a Bill of Rights, challenges to suppression of individuality usually occur through anti-discrimination legislation. School uniforms are traditionally present in many Australian schools, both government and non-government, and have been upheld over individual freedom of expression challenges on several occasions. In New Zealand, the cases cited indicate that individual expression, particularly in terms of cultural identity, is supported through the Bill of Rights. The arguments Alston raises with respect to the impact of compulsory school uniforms in different contexts challenge Australian readers to reexamine our complacency with the status quo.

We have added a new section to the journal—*Jurisdictions*. Over coming issues, we will provide articles commissioned from authors describing their jurisdictions and how their courts and legal challenge system operate. In this issue we provide an overview of the federal court system in the USA. The paper by Mawdsley and Cumming includes judgments from a number of Circuits and Courts of Appeal. In this jurisdiction paper, including a helpful diagram, Mawdsley walks us through these different Circuits, the appointment of the judiciary, and their ways of operating. We hope you find this interesting in understanding court decisions from the USA and the ways in which the judicial system of a country that in many ways is so like Australia and New Zealand can also be so different.

Finally, the case note in this issue updates the litigation history of the 'Auslan' discrimination case involving Tiahna Hurst and Education Queensland. Auslan is the indigenous language of the Australian Deaf community. Tiahna Hurst, severely to profoundly deaf since birth, had claimed that the refusal of Education Queensland to provide her with an education in her native language amounted to indirect discrimination within the meaning of the *Disability Discrimination Act 1992* (Cth) (*DDA*). Although the Federal Court held that it was not 'reasonable' to expect Tiahna to receive her education in Signed English rather than Auslan, Tiahna was denied a remedy in that the Court held that she could 'cope' with this arrangement. The Full Federal Court has recently held

that Lander J of the Federal Court erred in his construction of the indirect discrimination provisions of the *DDA* and made a declaration that Education Queensland had, indeed, discriminated against Tiahna.

A Coming Focus

One of our contributors has suggested revisitation of key themes and papers from past issues of the journal. We think this is an excellent idea. In future issues of the journal you will see selected past articles making a reappearance. These will be selected on the basis of topics that are always of interest in education law. To accompany each of these articles, we will invite a leading education law proponent to provide a reflection on the article including an update on the current law, policy and practice matters that may have changed, and possible future directions. The topics we will address will include inclusion and students with disability, workplace relations, physical injury and safety, and bullying.

We hope you enjoy this double issue and the variety of education law issues that are addressed from jurisdictions around the world.

Endnotes

1. Department of Foreign Affairs and Trade, Australian Government, *Exports. Growth and Diversity* <http://www.dfat.gov.au/facts/growth_and_diversity.html> at 10 July 2006.
2. *Wu, Mr Ying Ching* [2003] MRTA 8095 (28 November 2003).
3. *Wisconsin v Yoder et al.* 406 U.S. 205 (1972).

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