

# EDITORIAL

This issue brings another comprehensive overview of the range of legal issues addressing schools and universities in Australia and New Zealand, and internationally, from issues of the interpretation of legislation for school and university performance and reporting to individual and constitutional rights. We are writing at a time when the Victorian Charter of Human Rights and Responsibilities Act 2006 is about to be implemented, ensuring that Australian educators will be watching more closely international agendas in student rights and responsibilities in schools. While the Victorian legislation will reflect an Australian approach, strengthening legislative power rather than individual rights through the courts, it will give new direction to Australian and New Zealand education law.

Bruce Lindsay, a new author to the journal, revisits a theme which has been of interest to several recent authors in the journal — the legal relationship between the university and its students. Lindsay, who has worked as a student advocate for many years and at a variety of Victorian universities, is presently a doctoral student at the ANU College of Law researching student disciplinary decision-making in Australian universities. Lindsay's article focuses on the avenues available to students to challenge university administrative decisions which affect them. He considers the scope of the availability of judicial review post *Tang* and argues that, despite the decision in *Tang*, the scope remains 'broad'. Lindsay also addresses the fraught question of whether the relationship between university and student is founded in contract. While it appears that, to date, a breach of contract action by a student against a university is likely to be speculative at best, Lindsay suggests that a further limit on the utility of such an action is that a court is unlikely to award any remedy other than damages and that damages do not really deliver a satisfactory outcome for a student seeking, for example, reinstatement after expulsion. An interesting aspect of Lindsay's article is its explanation of Federal Government intervention into the management of university – student disputes. Recent legislation attempts to impose core standards upon the grievance and review procedures available to students complaining in relation to both academic and non-academic matters. Lindsay's article is both a useful summary of Australian research into the university–student relationship, including research published in this journal, and a stimulus to further debate.

The article by Elizabeth Dickson is also of particular relevance to those interested in the tertiary education sector. It concerns the impact of the *Disability Standards for Education 2005* (Cth) upon tertiary education providers. The *Standards*, enacted under the *Disability Discrimination Act 1992* (Cth), require education providers to make 'reasonable adjustment' to their procedures, curriculums and facilities to accommodate the educational needs of students with disabilities. As the university and TAFE sectors enrol large numbers of students in a vast array of different courses, management of compliance with the *Standards* has inevitably become a challenge. Dickson's article considers what the tertiary sector may learn about the nature of reasonable adjustment from existing disability discrimination case law. She looks at a variety of cases involving the tertiary education sector where students with disabilities have challenged the sufficiency of the accommodations provided to them. The article is likely to be a useful read to both academics and administrators working in universities and TAFE colleges.

Ben Mathews and Des Butler, of the QUT School of Law, and Kerryann Walsh and Ann Farrell, of the QUT School of Early Childhood Education, are presently engaged in a major research

project concerning the mandatory reporting of suspected child abuse. We are fortunate to have already published some of their interim findings in an earlier edition of the journal. In this issue, the authors respond to a controversial article by Jean Healey, also, published in an earlier edition of the journal, in which Healey contends that the relevant New South Wales legislation may be wide enough to mandate the reporting of schoolyard bullying and not just incidents of adult abuse of children. While acknowledging the harm caused by peer abuse, Mathews and his co-authors mount a persuasive case for their argument that the legislation is confined to the reporting of abuse by what the legislation describes as ‘a parent or other caregiver’. They suggest, further, that on account of significant differences between peer abuse and adult abuse, in terms of the nature of the behaviour involved and its psychological impact, the ‘power’ relationship between the parties, and the availability of support structures, peer abuse is, perhaps, more appropriately dealt with through in school mechanisms rather than through the more formal legislative regime. The authors of this article and journal readers will no doubt be interested in hearing further argument on the issue from Jean Healey. Stringent academic debate of this kind can only enhance understanding of the imperatives underlying the legislative framework for the reporting of suspected child abuse.

Our international contributors once again provide interesting insights with which to examine our own practices. Raj Mestry, a new contributor to the journal, writes from the University of Johannesburg in South Africa on the implications of the South African Constitution and its enshrined Bill of Rights for religious rights in schools. The new Constitution has recognised the cultural diversity and religious pluralism of the new South Africa. However, subsequent policy on Religion and Education, with a focus on compulsory broad religious study, may be seen as restricting the rights of schools to implement individual religious education programs, the approach taken in Australia by many of our non-government schools, within school time, and which has received endorsement through both legislation and the courts. Mestry discusses the constitutionality of school religious instruction classes and religious observances held in school locations. He concludes that where attendance at religious instruction classes is voluntary, their provision is not unconstitutional. Similarly, religious observances should be allowed. However, the restrictions placed on schools through the Religion and Education policy may be interpreted as counter to the intention of the Constitution to endorse freedom of religion.

Ralph Mawdsley is a very familiar author to attendees at the ANZELA annual conference and readers of the *ANZJLE*. He frequently addresses issues of parent and children’s rights in education and the U.S., and the directions emanating from their most recent case law. This article essentially addresses the issue of student rights to wear clothing of their choice and grounds where schools are able to restrict such rights. The cases are interesting in Australia, given most schools, both government and non-government, endeavour to maintain either uniform policies, or dress codes. We are not aware of any cases involving apparel (as opposed to hair length and the wearing of jewellery) in Australia, and most such situations would be handled in school. Situations have been reported in universities in Australia, and some private residential colleges, often with a religious foundation, have dress codes that restrict ‘offensive slogans’. Perhaps an Australian or New Zealand author would like to do an examination of dress codes in our schools, and universities, to examine the restrictions, and possible penalties, that apply. In his article on the U.S., Mawdsley discusses restriction in ‘student expression’ in the wearing of t-shirts. In the U.S. context, such matters become court contestations, leading to the setting of legal precedent, and then issues of the interpretation of previous decisions and phrases considered key in the judgment. An Australian college may restrict the wearing of ‘offensive slogans’; U.S. case law turns on what is ‘offensive’. Once again, the discussion of U.S. case law provides invigorating reading for non-U.S. readers. Issues arise as to

whether schools may restrict student expression in the form of clothing if it is contra to school drugs and alcohol policy, contrary to the good order of the school or discriminatory, but not if it is censorship of political expression. Further the issue of control of student expression off school campus is raised.

Charlie Russo and William Thro from the U.S. have provided another insight into competing rights in American public schools — here between parents and educators in establishing curriculum. Australia and New Zealand, despite our centrally-developed curriculum, recognise parent input through the involvement of parent advisors on curriculum boards. It would be interesting to see how comfortable we would be with stronger parental control, argued on a constitutional right. Charlie is another author familiar to ANZELA members through his regular attendance at our annual conferences, and to readers of the *ANZJLE*. William Thro is a new contributor and his collaboration with Charlie a welcome addition. Their article commences with an analysis of the U.S. case that has enthralled many an ANZELA conference presentation, *Brown v Hot, Sexy and Safer Productions*. Contrary to our expectations of the directions U.S. courts might be expected to follow, this case found that the exposure of school students to the content of this professional development program did not violate student or parent rights to contribute to curriculum, and the education of their children in their chosen school, perhaps overturning an earlier ruling that parental involvement was important in children's education. We suspect that in Australia, even in a nation without such recognised rights, parents would expect to give permission for their children to have attended the activities discussed in *Hot, Sexy and Safer*. However, we have not yet had to address issues such as the children's rights if they had wished to attend, versus their parents' authority. Following example from other Australian and New Zealand areas of law, the parental authority most likely would be considered superior. The cases discussed by Russo and Thro indicate that while school rights to determine instruction generally predominate over parental rights, the outcomes are not clear cut. Russo and Thro conclude that curriculum developers and schools in all nations should consider the appropriate involvement of parents in developing programs and collaboration, particularly in areas that educators can identify as contentious but with the rider that the rights of students themselves should also be considered. This may be one area where legislation such as the new Victorian Charter will provide guidance to practice in Australia.

Finally, Andrew Knott provides a book review of a Canadian text on Sexual Misconduct in Education. One of the authors, Judge Marvin Zuker may be familiar to ANZELA members. He has long been an advocate and author in the area of education law. Our observation is that Canadian education and Australian and New Zealand education share strong links reflecting our British Commonwealth heritage. This book provides comprehensive analysis of the issues of prevention, reporting and discipline of school staff in the area. In his review, Knott provides an overview of the content of each chapter and an insightful analysis of the applicability of the Canadian experience to our contexts.

We would like to thank our readers for their engagement and feedback on the issues of ANZJLE and look forward to providing further interesting reading in 2008. We hope that you have an enjoyable break over the summer period (for the southern hemisphere readers) and wish you the best of the season's celebrations.

Joy Cumming  
Elizabeth Dickson

