

# EDITORIAL

Schools are about education of children and young adults. They constitute the largest social institution in the world as a system which nearly all young people are required to attend. Schools have been designed as places where large numbers of children congregate for many hours of the day. These children have little voice in the operations and foci of the school. Perhaps then, we should not be surprised that while, for adults and teachers, the focus of schooling should be on the goals of education, the end result of the social structure of schools is the need to focus much attention on the social conduct of children and young adults in and out of this setting with a view to maintaining good order.

In this volume we have five articles that consider various aspects of the behaviour of school students, issues of responsibility, and effective means for resolving disputes. The articles are by authors from different parts of the world, demonstrating the commonality of issues that schools, as they are structured, face.

The first article, by a new contributor to the journal, Marie Parker-Jenkins, writing from an English perspective, discusses the issue that increased violence in schools and among the young is being attributed to the demise of physical violence by teachers in the school, that is, the demise of the use of the corporal punishment. Parker-Jenkins, who has researched this area extensively, demonstrates effectively not only that there is no evidence for such claims, but also that any increase in violence appears to reflect the world that surrounds students, popular culture, and disaffection with the relevance of much curriculum for many students. She explores the changes within the legislative and policy framework of England that affect ways that teachers can respond to student violence in the classroom, and highlights the need for effective structures and partnerships between schools and the community. Parker-Jenkins provocatively queries whether the basic principle of the United Nations' *Convention on the Rights of the Child* — that all children have the right to education<sup>1</sup> — should stand under all conditions. In Australia, we are familiar with alternative forms of schools that children who are demonstrating extreme antisocial behaviour can attend, and where they are often successful. The Albert Park Flexi School in Brisbane is an example. However, our legislation does allow for students to be excluded permanently from school during the compulsory years on behavioural grounds.<sup>2</sup> Perhaps the answer lies not just within such schools but within more reform, as Parker-Jenkins suggests, to current schools and curriculum.

We have two further contributions from our American colleagues, Charles Russo and Ralph Mawdsley, who have been regular supporters of ANZELA conferences and contributors to this journal. Their contributions, as always, acquaint us with the directions of U.S. law and allow us the opportunity to compare our own legal situations and schools with those of the United States. Australia is unlikely to reach either the legalistic framework in which educational issues in the U.S. arise, or the volume of legal disputes that occur. However, the issues that Russo and Mawdsley raise are always issues that we also face.

Russo discusses issues related to sexual misconduct, or sexual harassment as it is referred to in the U.S., in schools. The cases examined relate to teacher-student harassment, and peer (student to student) harassment. In the interesting ways of courts to extend the parameters of

legislation to consider new directions, such sexual harassment cases in the U.S. have been dealt with under Title IX of the federal *Education Amendments of 1972*, originally intended to ensure gender equity in sport. This enabled the Federal Court to indicate the extent to which school boards may be held liable, if they were in state of knowledge about the harassment but appear to have been ‘intentionally indifferent’ in response. Readers will be able to consider the conduct of the authorities in these cases, and the findings of the court, in comparison with those from the well-known Australian case on vicarious liability and non-delegable duty for sexual abuse, *New South Wales v Lepore*.<sup>3</sup> The U.S. cases considered include misconduct using technology, becoming a major concern in Australia also, and issues that have arisen due to sexual orientation. The article concludes with suggestions for positive school actions that are applicable in all parts of the world.

Mawdsley examines the issue of parental responsibility for the actions of children, when schools and school officials are able to avoid liability. In these cases, parents of injured children will seek remedy from the parents of the perpetrators. As Mawdsley shows, parental responsibility has been written into laws on tort responsibility in the U.S., shifting the ‘legal focus from parental vicarious liability to parent liability for their own actions in failing to adequately supervise and control their children’.<sup>4</sup> However, many complex issues need to be resolved and a high burden of proof established for parental liability to be found. Further, statutes in many U.S. states have restricted possible damages payouts. The issues discussed by Mawdsley are not far from current public interest in Australia. Reports of parents being fined \$200 (originally intended to be \$2000) by courts for antisocial behaviour by children have emerged, with public comment on the futility of such action and the increased burden on a likely stressed household.<sup>5</sup> In another case, parents have been ordered to pay \$60,000 compensation to victims of their children for actions outside schools.<sup>6</sup> More recently, the media have argued that ‘parents of the bullies ... have to start pulling their weight’ and pay the large damages that are resulting from school bullying.<sup>7</sup> The article by Mawdsley is timely for demonstrating that what seem to be simplistic approaches are complex in law and appear to have little positive impact on children’s behaviour. This is not the best use of resources to deal with antisocial behaviour problems.

Cumming and Mawdsley provide an Australian perspective on an issue that arises in the U.S. with some frequency — strip searches of students in schools for behavioural matters. Following consideration of the developments in the U.S., Cumming and Mawdsley explore the legal status of student searches in schools in Queensland and New South Wales for suspected drug or weapon possession. They find, once more, that issues in the U.S. that are determined by the courts, in Australia are governed by policy within legal frameworks. The article examines the policy guidelines that restrict school capacity to conduct searches of students and require the involvement of police, who are in turn governed by laws on police responsibilities. The practical implications of these directions for Australian schools, and the possibly negative impact on students, whether appropriately or inappropriately suspected of drug or weapon possession, are discussed. Cumming and Mawdsley suggest that allocating increased professional responsibility to schools and school staff to manage enquiries may be more effective in resolving initial enquiries.

The final article of the suite of five on school and student behavioural issues, by Sally Varnham, discusses initiatives in New Zealand and Australia to resolve the conduct and behavioural issues discussed in the previous articles in an effective and positive manner — restorative justice. As the articles show, confrontational and adversarial legal approaches do not appear to be effective in modifying child and youth behaviours. They also do not place an emphasis on community involvement and support or on developing responsibility in the individual for their actions.

In her article, Varnham explains the principles of restorative justice and how they have been applied successfully in a number of settings in New Zealand. As Varnham notes, a major benefit of restorative justice is that ‘it provides an early opportunity for behavioural modification and inculcation of notions of responsibility’.<sup>8</sup> Perhaps the most common theme that pervades these articles is the need to develop effective ways, through schools and the community, to enable students to take more responsibility for their own actions and learning, and to understand the consequences for themselves and others of inappropriate actions. Restorative justice provides a means for recognising and respecting the cultural diversity of students in our schools and for engaging with communities. As Varnham’s article demonstrates, restorative justice is being tried in many jurisdictions around the world with promising outcomes, and may provide the positive future that our authors are commonly seeking. Restorative justice approaches will require the commitment and engagement of authorities, schools and the community, no one party can be successful alone.

Our final article in this volume also examines issues of student behaviour but from an academic perspective. It reflects previous forays we have made into the world of legal education, that is, the preparation of lawyers. In a previous volume we have considered issues of student accuracy of referencing and plagiarism, and the intervention of the courts, as a matter of significance for admission to practise law.<sup>9</sup> The article ‘Referencing as evidence of student scholarliness and academic readiness’, by Robert Ellis, Mark Freeman and Amani Bell, explores the issue of student referencing within a university legal education course but, as a change of focus, by examining the academic development revealed by students in engaging with such academic requirements. Ellis et al. use a well-known learning framework to classify the responses given by a large number of students within a Business Law course to explain their academic focus. Student responses ranged from academic engagement (the goal of educators), through meeting expectations of assignments, to being safe against plagiarism challenges. Student referencing and plagiarism are major issues across all levels of education, and it is timely to explore educational issues in this area as educators, within the spirit endorsed in the previous suite of articles in this issue, and to seek ways to work positively with students to meet educational aims and modify inappropriate behaviours. We are sure educators of students at all levels will find this an interesting insight into this area of education that crosses into the area of law.

Finally, we are pleased to provide a review, written by ANZELA director and Head of the School of Business Law and Taxation at Curtin University, Joan Squelch, of the new Australian education law text, *Schools and the Law*. Des Butler and Ben Mathews, both of the Law School of the Queensland University of Technology, have produced a very readable explanation of often complex education issues which will be useful to lawyers and educators alike. Chapters are devoted to children’s rights, tort law, statutory requirements relating to child safety, student misbehaviour and discipline, equal opportunity and privacy. As Joan points out, a consistent strength of the book is its comprehensive coverage of the law in all Australian jurisdictions.

We hope that you enjoy this issue of the journal and find it an informative resource for your practice, whether in the legal profession or schooling.

#### ENDNOTES

1. *Convention on the Rights of the Child*, opened for signature November 1989, UNGA 44/25 of 20, art 28 (entered into force 2 September 1990).
2. Education (General Provisions) Act 2006 (Qld) ss 200, 289.
3. *New South Wales v Lepore* [2003] HCA 4.

4. Ralph Mawdsley, 'Parent Liability for the Intentional Tortious Acts of Their Children: A U.S. Perspective' (2008) 13(1) *Australia and New Zealand Journal of Law and Education* 33.
5. Amanda O'Brien, *Parents Fined \$200 If Kids Run Wild* (2008) <<http://www.news.com.au/story/0,23599,23414362-1245,00.html>> at 24 March 2008.
6. *Parents to Pay for Children's Crimes* (2004) ABC (<<http://www.abc.net.au/news/stories/2004/07/09/1150374.htm>> at 24 March 2008.
7. 'Make Parents Pay', *The Herald Sun* (Melbourne), (17 May 2008), <<http://www.news.com.au/heraldsun/story/0,21985,21743570-5000117,00.html>> at 24 March 2008.
8. Sally Varnham, 'Keeping Them Connected: Restorative Justice in Schools in Australia and New Zealand – What Progress?' (2008) 13(1) *Australia and New Zealand Journal of Law and Education* 71.
9. J. Joy Cumming, 'Where Courts and Academe Converge: Findings of Fact or Academic Judgment' (2007) 12(1) *Australia and New Zealand Journal of Law and Education* 97.

Joy Cumming  
Elizabeth Dickson