

EDITORIAL

Once again, the articles in this issue demonstrate the breadth of legal matters that confront educational institutions. The issue includes new and well-known authors and addresses school responsibility for students with disability and in family law, teacher autonomy and authority, and finally, the quality of administrative decision-making on student disciplinary matters in universities.

The first two articles in this issue provide considerable background on major issues confronting schools, teachers and lawyers in education law: appropriate provisions for students with disability, and in particular students with disability and behavioural issues; and appropriate management of family law issues for students.

The first article on amendments to the Australian *Disability Discrimination Act 1992* (Cth) (*DDA*) is by a new contributor to the journal, Nicola Smith, a lawyer in the public sector. Nicola examines the amendments in light of the well-known Australian case *Purvis v New South Wales* (*Purvis*).¹ This case involving the appropriate disciplinary action for a student with disability which led to manifestations of problematic behaviour at school established that the comparator for considerations of discrimination was a student, without the same disability, who in the same or similar circumstances exhibited similar problematic behaviour. At issue in *Purvis* was whether the *DDA* imposed a positive duty to provide reasonable adjustments to accommodate a student's disability — the majority of the High Court said it did not. At that time, a claim of unjustifiable hardship under the *DDA* could only be used by a school to exempt discriminatory action against a potential student, not a student like Daniel Hoggan, in *Purvis*, who was already enrolled. Behaviour as a manifestation of a disability was also not included as a characteristic in the *DDA* definition of disability. Both of these deficiencies have now been addressed through amendment to the *DDA*. Nicola notes that one of the effects of changes to the *DDA* and introduction of the Disability Standards is that schools may need to tailor behaviour codes for students with disabilities. Appropriate provision for students with disabilities remains one of the major areas of legal concern, and administrative challenge, for schools in many countries. Nicola's analysis, while based in Australian law, will resonate with many international readers.

Similarly, schools around the world can encounter difficulties in managing family law directions for students whose parents have divorced. Often the result of such marriage breakdowns is that students will live in more than one household and schools can be caught in the middle of parenting disputes. In the second article in this issue, Donna Cooper, Kylie Perkins and Gary Couper, new contributors to the journal who draw on a considerable range of expertise and experience in family law and education, note the significant number of children living in these circumstances. The authors provide discussion on how family law matters are determined in Australia. They then provide a very comprehensive guide for school leaders and teachers in Australian schools on best practice approaches to family law scenarios that arise in practice. Schools have to balance their responsibilities to parents while also ensuring best outcomes and personal safety for children. We are sure the practical focus of the final section of this article will be highly valued by schools around Australia. Again, while family law and legislation may differ across the world, the suggested practices here will have applicability in many countries.

The next three articles in this issue consider the extent to which schools and teachers have freedom of action in their everyday education practices or are controlled by external regulation of public thought and policy.

The article on government regulation of non-public schools in the United States of America (US) is the first of two articles on government regulation and schooling by Ralph Mawdsley, a long time contributor to the journal, and Joy Cumming. The second article looking at government regulation of Australian schooling will be published in this journal in Volume 17 Issue 2. Internationally, there has been a growing trend for governments to use the power of the purse to develop legislation that directs education policy and practice. It is interesting to explore how different constitutional framings affect the authority of government intervention in this area. As the article on government regulation in the US in this issue shows, the US Constitution reserves education as an area of power for US states. However, the focus of this article is the authority of the US federal and state governments to intervene in the day-to-day operation of private schools. Interpretation of the liberty clause in the US Constitution provides parents with the freedom to choose nonpublic schools for their child and to direct the education of their child. However, as the analysis shows, private schools in the US are still subject to a range of federal and state statutory and regulatory controls, often contested by individuals and schools in the courts.

Following this discussion of government control of schooling in the US, we have a second article, authored solely by Ralph Mawdsley, looking at control of teachers' freedom of expression in US schools. We take this opportunity to congratulate Ralph on his recent joint appointment to a position in the Cleveland-Marshall School of Law at Cleveland State University in conjunction with his ongoing position as Roslyn Z. Wolf Professor of Education in the College of Education and Human Services. Education law is a highly recognised field in the US. This joint position is evidence not only of Ralph's standing in the field but also continued recognition of education law as an area of specialised legal knowledge. Ralph's article on teachers' free expression considers a recent US case examining the subtle interpretations that can be made as to whether statements by teachers are within their employment and if so, whether they are appropriate, or outside their employment. Further, the autonomy of teachers within classrooms in instructional content, as an extension of free expression, is examined. Again, these considerations occur within the individual right of free speech bestowed by the US Constitution. At a time when teachers in many countries are considering their freedom as teachers to have personal profiles in social media, this analysis of the substantial US case law on what constitutes appropriate classroom and public discourse by teachers is very enlightening.

The third article on this theme focuses on teachers' authority in classrooms and the contentious area of reasonable corporal punishment in schools as a disciplinary strategy for students' misbehaviour, a topic that has been discussed previously in the journal.² In this article, Mui Kim Teh, a new contributor to the journal but longtime contributor to ANZELA Conferences, discusses whether the abolition of reasonable corporal punishment in schools has had the impact and outcomes expected. In her scholarly article, she examines legislation and policy on corporal punishment in six countries, the US, Australia, New Zealand, England, Canada and Singapore. She notes the basis for changes through conventions such as the United Nations *Convention on the Rights of the Child* ('CRC'), and interprets the importation of the CRC into legislation and policy according to cultural contexts. Kim's conclusion is that reasonable corporal punishment may still be an effective mechanism for student discipline and maintaining effective classroom environments. While many readers may not agree with her conclusion, the analysis in this article of change and effect provides informed reading on the issue.

The final article in this issue focuses on freedoms and rights from a different perspective — for students in higher education who are involved in administrative decisions on disciplinary matters. Bruce Lindsay, who has previously published in the journal on the treatment of student plagiarism by universities,³ provides an indepth examination of decision-making practices within two Australian universities, taken as case studies. He has been given access to, and examined, files for 38 disciplinary matters. Bruce analyses the evidence from the case files for the accordence of university decision-making processes as quasi-judiciary actions with natural justice and expected elements for procedural fairness in administrative decision-making. Overall, Bruce concludes that, based on the file records, many actions by the universities fall short of appropriate standards, with improvements in disciplinary practices, including more focus on the role and training of decision-makers and ‘preliminary investigators’, needed. Universities are not alone in struggling to manage internal procedures to discipline students, and staff, on policy infringements and disciplinary matters. This article has wide jurisdictional appeal through which we can all examine how our own administrative decision-making practices compare against the elements of procedural fairness he so thoughtfully has elaborated.

Finally, we would like to inform you that 2012 is our last year as co-editors of the *International Journal of Law & Education*. Our first issue of the journal as co-editors was Volume 10 Issue 1 in 2005. When we step down, we will have been responsible for the journal for eight years. We have overseen the transition from the *Australia & New Zealand Journal of Law & Education* to the *International Journal of Law & Education*, and the inclusion of past volumes and articles of the journal on the Australian free access website www.austlii.edu.au. We consider it appropriate now to allow others the opportunity to undertake this role. We look forward to providing you with information on the new editor in the final issue for 2012, 17(2).

ENDNOTES

- 1 (2003) 217 CLR 92.
- 2 Marie Parker-Jenkins, ‘Sparing the Rod: Reflections on the Abolition of Corporal Punishment, and the Increase in Violence in British Classrooms’ (2008) 13(1) *Australia & New Zealand Journal of Law & Education* 7; Marie Parker-Jenkins, ‘Children’s Rights and Wrongs: The Developing Nature of Human Rights for Pupils at School’ (2011) 16(1) *International Journal of Law & Education* 87.
- 3 Bruce Lindsay, ‘Student Plagiarism in Universities: The Scope of Disciplinary Rules and the Question of Evidentiary Standards’ (2011) 16(1) *International Journal of Law & Education* 27.

Joy Cumming
Elizabeth Dickson