

# EDITORIAL

Welcome to the second issue of the newly-renamed *International Journal for Law and Education*. Thank you for your patience as we have worked through the issues for 2009, including the new style and layout. With these behind us, we are well on track for 2010.

This issue continues to provide insightful comment from authors from Australia, South Africa and the United States of America (US). This issue demonstrates the breadth and depth of controversies that arise in education and the law, both for schools and universities, and for students, staff, parents, policy-makers and legislators.

Rika Joubert, a well-known education law expert in her home country of South Africa, provides a South African overview of issues of children's rights, under the umbrella of both the United Nations Convention on the Rights of the Child and the South African Constitution. Both these documents place the 'best interests of the child' to the forefront in all decision-making. The issue of competing rights in education are always paramount in education law. While education serves a number of spheres, the main players are children, and their families. Teachers are also critical. Schools act within the broader frameworks of societies and cultural values, and often appear to be the testing grounds for issues that are not resolved in the wider community. Joubert examines the legal issues that have arisen in a number of areas, as the individual rights and best interests of the child are tested against a constitutional framework. She examines issues of religion, dress and language, providing suggestions for how schools could act that are applicable to all nations.

Ralph Mawdsley, a regular contributor not just to this journal but many international education law journals, provides a detailed analysis of interpretations of the United States' (US) *Individuals with Disabilities Education Act* (IDEA), first introduced in 1990 with subsequent amendments, and the requirement to provide a free, appropriate, public education (FAPE) for children with special needs, and the issue of reimbursement when parents place their child in private education. A major issue is the tension between the intention of IDEA amendments and judicial interpretations. Timing is a critical issue. However, we would agree with Mawdsley's considerations that when a school has failed to identify a student's needs, and parents have been diligent in pursuing appropriate diagnosis and intervention, the application of IDEA and parent reimbursement appears fair. Although the US is not a signatory to the United Nations Convention on the Rights of the Child, the current interpretation of an FAPE appears to be endorsed as meaning 'best interests' of the child, that is, a program of education designed to offer an optimal learning environment to a child'. It is interesting to note that the issue of failure to diagnose a student's learning needs might be challenged in jurisdictions other than the US as educational negligence or malpractice. We will wait for the next instalment from Mawdsley and further clarification of the US Congress's intention in the amendments to IDEA, given the financial pressure current arrangements are placing on very limited state funding.

Comparative studies of issues in education law are a mainstay of our journal. Through the eyes of others, we can each learn and understand more about our own systems. A new contributor to the journal, Lelia Helms, provides an overview of litigation associated with universities, and other tertiary settings, comparing the United States and Australia. Helms, a Professor in Educational

Policy and Leadership Studies at the University of Iowa, completed the work during a period of six months spent in Australia in 2009 at the University of Sydney. As she notes, considerable difficulties exist in trying to compare jurisdictions and different organisational structures — community colleges in the US, further education and industry training colleges in Australia, as well as public and private universities. However, she provides a clear mapping of both sectors and interesting analyses of different types of litigation in the ‘snapshot’ year of 2007, chosen as a point in time because of the availability of full records. One of the interesting comparisons is the number of Australian disputes around universities involving refugee tribunals, versus the number of US disputes involving student bankruptcy and fee loans. Another distinction provides Helms with the opportunity for some commentary on current Australian debate regarding the potential introduction of an Australian bill or charter of rights.

Reviews of patterns of litigation have become a regular part of the literature in the US but are rare in our journal. Lelia Helm’s methodology provides not only interesting results — future research students and staff may be interested in applying the methodology to their own research. As one reviewer of this article noted, it will be interesting to see a follow-up review in a few years’ time to see what patterns continue to emerge. Overall, the article demonstrates that litigation is present in both nations and in Australia may be increasing in contrast to in the US, the results are surprising on many fronts, but may, in the end, as Helms states, be traced to the changing nature of the sector in each nation.

Another comparative examination of US and Australian legislation, caselaw and policy is provided by Joy Cumming and Ralph Mawdsley, a team well-known to this and other journals. Their article examines the current status of funding in both nations to schools with a religious affiliation, and the ways in which apparently similarly-worded Constitutional Establishment Clauses have been interpreted. On the surface, funding to schools with religious affiliations is not supported by the US interpretation of their Clause. However, as the article discloses, many areas exist where funding occurs for school resources, for support services, and to individual students and their parents. While funding to promote religion cannot occur, funding that is neutral in its application to religious, private or government schools has been found to be appropriate. What is interesting is that in many circumstances the funding available to provide a student with education in a religious private school in the US may exceed the cost of education in a public or government school.

In Australia, the Establishment Clause has been interpreted definitively as not preventing funding to schools with religious affiliation. In the article, Cumming and Mawdsley examine several matters, including income tax collection, interpretation of ‘reserve powers’ in the Constitution, and the power of the purse, that have given the Commonwealth government control of such schools and their resourcing, with states and territories playing the major role in the accreditation of the schools. The article provides two current points of interest: interpretations of the US Establishment Clause appears in practice to be converging with Australian interpretation but US state constitution establishment clauses may override the federal interpretation; by contrast in Australia, the authors consider whether local government may be exerting control over the development of religious schools through their planning authorities. The major players in the funding of religious schools may no longer be the federal governments in either nation.

Another new contributor to the journal, Mary Wyburn provides a comprehensive discussion of the implications of insolvency law in Australia for education. The global financial crisis has heightened awareness for all of credit and insolvency issues, both for corporations and for individuals. As Wyburn demonstrates, bankruptcy and corporate winding-up procedures are

complex legal procedures, not to be undertaken lightly, and with responsibilities on the creditor seeking the proceedings, as well as the debtor. However, students, organisations, schools and universities are not isolated from poor credit and financial matters. Private schools around Australia have struggled with parents becoming laggard on payment of school fees, and determinations of appropriate actions to follow. Unfortunately, schools have salaries and other commitments, and cannot function unless fees are paid in a timely manner. For schools, bankruptcy proceedings against parents are a final measure, but one that has to be considered from time to time. Wyburn notes that the issue relates not only to private schools but also to government schools. She provides a clear overview of how Australian principles of personal insolvency, or bankruptcy, operate and are used in different instances by unpaid creditors. The intention of the Australian parliament to strengthen the general principle that the commencement of bankruptcy proceedings should be for the benefit of all creditors, not just for an unpaid debt collection, is likely to lead to changes to Australian legislation in the area.

Wyburn's discussion of possible misconduct, particularly involving communication through a debtor's child, is particularly important for schools to note. Wyburn's extensive discussion of current issues of the solvency of a number of training providers shows that the extension of education and training into commercial business opportunities brings risks and consequences for both the businesses and students, both domestic and international.

From time to time we receive submissions, and publish, articles on legal education matters. While there are journals devoted to this topic, we consider it a relevant component of our publication on legal issues relating to education.

This issue introduces many new contributors to the journal, and the contributor of the final article on legal education shows promise of becoming a major and ongoing contributor. Still a student of law, Jennifer Sallans has provided a thought-provoking piece about changes to the education of lawyers. As Sallans notes, the requirements for all legal training in Australia to address the 'Priestley eleven' generally mean a focus for students on the adversarial nature of law. However, negotiation, mediation and dispute resolution are predominant legal approaches in Australia, and internationally, and few legal disputes in Australia are resolved within the courts. Drawing on mediation theories, Sallans' argument is that law graduates will have little exposure to different styles of negotiation and dispute resolution. Sallans explores different ethical stances of lawyers and the mediation styles they are likely to exhibit.

Sallans' conclusion that both ethical studies and mediation approaches should be core, and early, aspects of legal training is one worth considering by the developers of legal courses. When we consider law in the context of education, often involving young children, mediation and dispute resolution may be the preferred ways to resolve issues and protect the wellbeing of all parties.

Finally, we have a case note on an interesting case in Queensland. Queensland legislation places an obligation on school principals or officials in both government and non-government schools to report suspected sexual abuse of a student to police. Readers of recent articles in the *Australian and New Zealand Journal of Law and Education* (our predecessor journal) by Ben Mathews, Jane Cronan, Kerryann Walsh, Ann Farrell and Des Butler may recall that similar legislation requiring the reporting of suspected abuse is in force throughout Australia. The Queensland case, *R v ZZ*, is the first known case where a school principal has been charged under legislation for failure to report such suspicions. Details of those involved are kept confidential, to protect the identity of the children involved. The defendant, a school principal in a non-government school, was found not guilty by the Magistrate, on the grounds that he had complied with the legislation. The

case demonstrates that apparently specific legislation can still be ambiguous in application. The outcomes of the case do not benefit any of the parties involved, but are likely to lead to revision of the legislation involved so that reporting requirements are more explicit and timely.

Joy Cumming  
Elizabeth Dickson