

EDITORIAL

We are delighted to have been appointed co-editors of the *Australian and New Zealand Journal of Law and Education* for the next three years and are looking forward to building on the fine reputation established by founding editor, Doug Stewart, and his talented successor, Kate Lindsay. We are registered teachers as well as education law academics and hope to make the journal a stimulus for discussion in both school staff rooms and legal offices around Australia and New Zealand. Both Doug and Kate will continue their considerable influence on the journal as consulting editors. We have also been fortunate to persuade several new faces to join the editorial board. Reid Mortensen, an Associate Professor of the TC Beirne School of Law at the University of Queensland, has written extensively in the areas of anti-discrimination and human rights law and has also served on the school board of a leading Queensland independent school. Two other appointees, Sally Varnham and Ralph Mawdsley, will both be familiar to readers of ANZJLE as regular contributors in recent years. Indeed, both, with co-authors, have contributed to the current issue. Sally Varnham has practised law in both New Zealand and London but, in recent years, has lectured law at Massey University's Wellington Campus. Her primary research interest is in legal issues relating to both compulsory and higher education, and her LLM and PhD theses are in the area of education law. Ralph Mawdsley is a Professor of Education at Cleveland State University in the United States. A qualified lawyer, as well as an educator, he has written extensively on education law issues, has served as president of the US Education Law Association, and edits or serves on the editorial board of several US education law journals. He has recently been awarded a prestigious Fulbright Scholarship to support his secondment to the position of visiting Professor of Law and Education at the University of Pretoria. Perhaps we can anticipate publishing the results of some of his planned comparative and collaborative research projects in South Africa.

This edition also introduces several new contributors to ANZJLE. Ralph Mawdsley's article in this edition is co-authored by Johan Beckmann, Professor of Education at the University of Pretoria. Sally Varnham writes with Patty Kamvounias, from the University of Sydney. Professor Jim Jackson from Southern Cross University, Deirdre Duncan from the Australian Catholic University, Sydney, Dan Riley, from the University of New England and Jean Healey from the University of Western Sydney are also published in the journal for the first time.

The contents of this issue yet again demonstrate the diverse nature of the education law issues that challenge our governments, school administrators, teachers and students. We cover the issues of freedom of religious expression in schools, staff bullying, student bullying and the freedom of speech rights of university staff.

Patty Kamvounias and Sally Varnham provide a timely and instructive analysis of the recent judgment of the High Court of Australia in *Griffith University v Tang*. In that case, The High Court determined that disaffected student, Vivian Tang, was not entitled to judicial review of the university's decision to exclude her from her doctoral program. As well as analysing the reasoning of the court in *Tang*, however, Kamvounias and Varnham, look at the broader question of the justiciability per se of university decisions relating to academic matters. They consider whether the avenue of judicial review is shut altogether or simply to students at universities such as Griffith which respond to student disciplinary matters and student grievances in accordance with policy rather than in accordance with purpose built 'enactments'. They suggest that in some

universities which have been delegated the power to make legislation, and which have exercised that power in relation to the regulation of academic matters, it may be difficult to mount the argument that a decision to exclude is not a decision made ‘under an enactment’ and therefore not subject to judicial review. They examine also the possibility of a disgruntled student bringing an action for breach of contract, a possibility tantalisingly raised but not resolved in the context of the *Tang* litigation.

Jim Jackson’s article addresses the topical issue of the extent to which academics can exercise freedom of speech while still meeting obligations owed to their university employers. In recent months the controversial opinions of Andrew Fraser from Macquarie University have brought this issue to the pages of the popular press. Jim Jackson’s article, however, is a scholarly examination of the legal constraints on speech which may limit an academic’s public expression of privately held views. The article provides a useful overview of Australian and New Zealand cases on point as well as surveying international case law in the area as a means of predicting the future development of the law in our region. It is an important resource for university academics concerned to discover the extent of any legal right to publish criticism of their university employer or comments which may bring their employer into disrepute.

The article on staff bullying by Deirdre Duncan and Dan Riley addresses another topical area and one which has, to date, stimulated little formal research—staff bullying in the education sector. While the article reports on the results of a survey completed, in December 2004, by around 200 employees of the Catholic Education system, its findings and recommendations are relevant to the education sector as a whole and, perhaps, likely to resonate the experience of the education sector as a whole. Their research evidences a need for administrators of education institutions to acknowledge that staff bullying occurs and that it must be formally addressed. Indeed, the Catholic Education system appears to be eager to tackle the workplace bullying issue with districts around Australia generating policies and protocols for handling this sensitive and potentially costly issue.

Jean Healey examines another, all too common, variety of bullying—peer abuse. While student to student bullying has certainly generated a greater volume of research in the education sector than workplace bullying, Healey takes the research in an interesting new direction. She queries the extent of the effect of recently enacted child protection legislation on the reporting obligations of school teachers and administrators and contends that it is may no longer be appropriate, or, indeed, lawful, to treat bullying simply as a pastoral issue. More controversially, perhaps, she suggests that the familiar intervention of ‘conflict resolution’ between victim and offender is not appropriate in many instances of schoolyard bullying. Child protection legislation, she contends, can be read broadly enough to require the reporting of peer to peer abuse to child protection authorities. Certainly, it is a fundamental principle of statutory interpretation that protective legislation is to be read broadly to the benefit of those it is designed to protect. Healey contends, however, that to read the legislation as requiring the reporting of peer to peer abuse would not only benefit the victims of bullying, it would also protect schools from legal action initiated by the victims of bullying alleging a breach of duty of care. Healey, an experienced educator but a non-lawyer, has highlighted a serious question about the scope of child protection legislation which ought also to be addressed by a practising lawyer with a good knowledge of the rules of statutory interpretation. We would welcome submission of such an article to the journal for publication in a future issue.

The article by Ralph Mawdsley and Johan Beckmann examines the ramifications for schools of the First Amendment to the Constitution of the United States which provides that no law shall

‘establish’ a religion or prevent the ‘free exercise’ of religion. His article raises an issue which, while clearly linked to the unique constitutional structure of the United States, is nevertheless relevant in many increasingly secular and increasingly multicultural nations—what is the place of religion in the schoolyard and classroom? In France the banning of the headscarf worn by Muslim students, for offending the clear separation between state and religion in that nation, excited bitter controversy. In the United Kingdom, however, the Court of Appeal has recently found that a school’s exclusion of a student whose preferred form of dress, the jilbab, offended the school’s uniform policy, breached her right to manifest her religious beliefs: see *R (on the application of SB) v The Governors of Denbigh High School* [2005] 2 All ER 396. Indeed, as early as 1983, the House of Lords found that the refusal of a school to allow a Sikh student to wear a turban, in accordance with his beliefs, amounted to unlawful discrimination: see *Mandla v Dowell Lee* [1983] 2 AC 548. In Australia, the observance in schools—and particularly state schools—of the Christian religious festivals of Easter and Christmas has become increasingly controversial. Claims, even, of racial and religious discrimination have been asserted by students and parents whose own beliefs are different from the ‘prevailing’ Christian ethos: see, for example, *A on behalf of V and A v Department of School Education* (2000) EOC ¶93 –039. Mawdsley and Beckmann conclude that, in the United States, ‘the appropriate relationship between government and religion is yet to be determined’. It would appear that this relationship is unsettled in many nations.

Finally, the case note on *Hurst and Devlin v Education Queensland* reveals that the demand by Australian Deaf students for instruction in their native language, Auslan, continues to challenge education providers. The note also reveals, however, that the operation of the indirect discrimination provisions of Australian anti-discrimination legislation remains unsettled in some respects. *Hurst and Devlin* is one of several recent cases where courts have found that complainants have had difficulty framing their cases to meet the distinctive elements of indirect discrimination. Further, the application of the law in *Hurst and Devlin* has suggested a potential new hurdle for complainants arguing indirect discrimination—a judicial willingness to find that a complainant can comply with the prima facie discriminatory condition imposed upon them, and is, therefore, not entitled to compensation.

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