EDITORIAL

This final issue for 2008 brings contributions from a range of ANZELA members and international contributors. The themes of the articles cover a diversity of topics showing the growth in areas that are being addressed within education law. Indeed, this is the focus of the first article, by our regular contributor Ralph Mawdsley from the United States of America (US), and Joy Cumming. They provide a comparative analysis of the matters arising in education law both in the US and Australia, and also in other nations, to argue that it is time that education law was recognised as a legal field in its own right. At present, in both nations, education law challenges are sited within other recognised areas of law — constitutional law, administrative law, employment law, discrimination law, and so on. However, increasingly, Mawdsley and Cumming argue, these fields, and the legal tests within, do not seem to provide satisfactory legal resolution to education issues. For example, applying a business model of vicarious liability to a school setting seems to beg the question of the nature of schools and compulsory education provision and school attendance for young children. Mawdsley and Cumming argue that four factors need to be met to sustain a separate field of education law. We leave you to consider this discussion and form your own opinion.

The following suite of three articles in this issue would seem to support the argument that education needs to have a separate field of law that recognises the complexity of education provision today. In the second article in the issue, Marilyn Campbell, Des Butler and Sally Kift discuss safe learning environments and cyberbullying. Bullying has long been recognised as a serious issue in schools and all Australian and New Zealand schools will have policies to address such student behaviour. A major focus of policies is on constructive support of students and empowerment of the individual to build resilience against bullying. However, school policies have not necessarily incorporated cyberbullying — occurring through mobile/cell phones or computer networks — as within the school jurisdiction. Campbell and colleagues examine the legal consequences of cyberbullying including the implications of criminal and civil law and duty of care. The discussion of duty of care demonstrates that education law and the legal liability of schools may no longer be restricted to legal responsibilities within the school, or students travel to and from school, but may extend to the social environment around individuals whose common agency is that they are in education.

Ben Matthews, Jane Cronan, Kerryann Walsh, Ann Farrell and Des Butler address the issue of education policies and teachers' responsibility to report child sexual abuse, undertaking a comparative analysis of the policies of three Australian states, New South Wales, Queensland and Western Australia. In the first two states, reporting responsibilities have been enacted in legislation, in the last, the responsibilities are policy-driven. However, in all states, the common law of negligence and duty of care of teachers may place additional requirements on teachers. Again this article demonstrates the developing nexus between specific law and requirements in educational contexts. How many professions and contexts have legislation about the requirement to report suspected child sexual abuse? This is clearly confined to caring professions as a start, including social work and health fields, but how many of these professionals are in daily contact with children and so vitally integrated with their social environment and personal development? The article by Matthew and colleagues draws on a larger research project they are undertaking

which also examines teachers' knowledge of policy and reporting requirements and practices. In this article, they discuss in detail the way the policies from the three states address seven key factors with respect to teacher responsibility and provide guidance to schools about appropriate reporting behaviours.

The comparative analyses of education law in the third article in this suite, by Elizabeth Dickson, examines the inclusion of students with disability-related behavioural problems in mainstream schooling in Australia and the US. In Australia, as Dickson discusses, the decision in *Purvis v State of New South Wales*[1] has meant that Australian schools are able to exclude students with disability-related behavioural problems from mainstream schooling. In Australia, students have to challenge such exclusion under discrimination law, and Dickson discusses policies and caselaw in Australia to demonstrate the difficulty of establishing discrimination for non-physical disabilities. Dickson. She then turns to the US, where in contrast to the Australian context, the federal *Individuals with Disabilities Education Act* (*IDEA*) creates a positive right for the inclusion of students with disabilities in schools. Dickson provides a thorough overview of the impact of this law for students with behavioural disabilities in the US, and a comparison of the two jurisdictions. As Dickson notes, the comparison is 'stark'.

The second suite of three articles in this issue examines issues of rights and freedoms in schools and universities, in Australia and elsewhere. Individuals around the world, even in jurisdictions such as Australia without a rights framework, appear to have increased awareness of the basic rights enshrined in various United Nations' conventions and treaties to which their nations are signatory. Even where such conventions and treaties are not directly incorporated into national legislation, individuals have increased expectations that their governments will respect their right to freedoms such as freedom of religion, freedom of speech and freedom of association. The issue that arises in education is the resolution of boundaries between the individual's right and the operation of an institution.

Mawdsley provides an update on employee free speech in schools in the US. He explores the recent US Supreme Court judgment in *Garcetti v Ceballos* (*Garcetti*),[2] in a context where individuals have a constitutional right to free speech, and the extent to which an employee's free speech can be curtailed to prevent disruption to a school's effective function. Prior to *Garcetti*, US courts had stated that individual rights were not 'shed … at the schoolhouse gate',[3] but had developed a test to determine the balance between individual rights and school authority. The *Garcetti* decision creates a different interpretation of the individual rights of an employee, removing the automatic constitutional protection in the contexts of employment. While Mawdsley notes that the new decision provides a clearer test, the court has identified three components that need to be considered, including whether the individual is speaking as an employee or as a citizen. While Australia has no right to freedom of speech, most individuals would consider that they have a right to express opinions publicly. However, the issues discussed in Mawdsley's article are relevant to Australian and New Zealand contexts of schooling. Many education authorities have codes of conduct that will restrict an employee's right to make public comment on issues related to their place of employment in public forums. At the same time, employees in Australia who have grievances or suspicions of illegal or unethical activity may be protected under legislation such as the *Whistleblower's Protection Act 1994* (Qld). Education is such a public enterprise, it can be difficult to determine the appropriate balance of individual right and employment responsibility.

Tie Fatt Hee from Malaysia has been a regular participant in ANZELA conferences and is well-known for his education law expertise on issues in the south-east Asia region. He has provided us with an interesting article that explores the issue of the right to freedom of religion

and students in a school in Malaysia. Hee discusses the constitution of Malaysia, the recognition of United Nations' conventions and treaties on human rights, and the endorsed right to freedom of religion. He discusses a legal challenge and subsequent appeals including the Federal Court on the issue of school authority, school uniforms and the freedom of religion. His analysis of the various judgments, and the points of law raised by the courts, provides considerable insight for western societies on internal considerations in a predominantly Islamic nation, but one that has endorsed cultural, ethical and religious plurality, about religious attire and student uniforms, and the balance of the authority of schools to preserve the efficient functioning of a school. The conclusion, that the education authority and schools could create a uniform policy that restricted some forms of religious attire, and the reasons thereon, will be very informative for all nations.

The last article in this issue is by Jim Jackson who has contributed many discussions on constitutional law matters and education. His article continues the theme of freedoms and education, and the potential of the impact of growing Australian federal control of universities and other education sectors through funding legislation requirements. Jackson traces the growth in such legislation, the sectors it now engages, and the conditions put in place. Legislation governs government and non-government schools, the technical and further education sector, and, he argues, most of all, the university sector. Jackson explores the Australian Constitution and the extent to which it authorises such federal control of educational activities or whether constitutionally they may still be perceived as areas of state authority. He calls for more active debate on these matters, rather than an apparent silent acceptance by the states of the federal incursion. At the time of writing this editorial, the Australian Government had announced it may support the reintroduction of the capacity for universities to charge a student amenity fee, in exchange for compliance over handling of student complaints and grievances. Despite Jackson's arguments, it may be that in education we will continue to see more legislation and controls. As authors in previous issues and the current issue of the journal have noted, we hope that such legislation does not reduce the academic freedom of education employees. As all of our authors have noted, the issue is balance but not restriction.

We wish you all a very peaceful and prosperous 2009 and hope that you have found this year's issues of the *ANZJLE* informative and valuable contributions to the area of education law. In keeping with the growing international and comparative nature of contributions and discussions in the journal over the last few years, the ANZELA executive has endorsed a change to the title of the journal. We believe that this change will reflect the position taken in the first article in this issue — that education law has become a significant international field of law. In 2009, the new journal title will be launched.

Endnotes

1. *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92 ('*Purvis*').
2. 126 S Ct 1951 (2006).
3. Ralph Mawdsley, '*Garcetti v Ceballos*: Balancing Employee Free Speech with Efficient Operation of Schools in the United States of America' (2008) 13(2) *Australia & New Zealand Journal of Law and Education* 65.

Joy Cumming
Elizabeth Dickson