EDITORIAL

Welcome to the first issue of the *International Journal of Law and Education* for 2010. We have articles from two contributors from the United States of America (US), Ralph Mawdsley, a regular in the pages of the journal, and Lelia Helms who wrote for the last issue, and who has produced for this issue another article reporting on her comparative research into education litigation. We have an article from New Zealand authors, Juliet Hyatt and Pheh Hoon Lim who also wrote for the journal last year. We are particularly pleased to welcome six Australian contributors new to IJLE: Sophie Riley and Grace Li, from the University of Technology, Sydney, Noeleen McNamara and Eola Barnett, from the University of Southern Queensland, Sonia Allan, from the University of Adelaide, and Glenda Jackson, from Monash University. There is no overarching theme for this issue of the journal. Instead, readers from across the education sectors are all likely to find something of particular relevance to their work and interests. There are articles on plagiarism, teacher misconduct, drugs in schools, home schooling, disability discrimination and legal education.

Juliet Hyatt and Pheh Hoon Lim examine issues that might arise when tertiary institutions use software, such as Turnitin, to prevent student plagiarism in assignment work. Such software is becoming more widely used. There are, perhaps, two particularly pressing legal problems with the use of such software. First, it requires an assignment submitted for checking to become part of the database used for future checks, thereby making it vulnerable to exploitation by others. Secondly, universities often require students to agree to submission in order to receive grades, enabling and exploiting an unequal power relationship over student rights to control their own work. The authors ask whether students agree to upload their work to these databases on the basis of sufficiently informed consent. Hyatt and Lim consider the ramifications of the use of plagiarism software which may be extrapolated from court decisions about its use and from the experience of educators who seek to exploit its capabilities. They report the US decision *AV v iParadigms*,[1] a challenge by students in the United States of America (US) against such software, and discuss the positives and negatives of its use in academic settings. Their article touches on issues of plagiarism definitions, copyright, privacy, defences against misidentified plagiarism, contractual relationships between students and higher education institutions, and ethical behaviour in general. Throughout their discussion they balance educational risks and risk management with legal risks and risk management. The authors suggest that such software should be regarded as a tool, not a 'decision-maker' and that its most beneficial use may be for educational, rather than punitive, purposes.

Ralph Mawdsley provides discussion on a critical issue facing our schools. We know from what seems to be increasingly frequent media coverage that some teachers act inappropriately with students and breach ethical guidelines about teacher-student relationships. Major concerns arise when such breaches involve sexual misconduct. Teacher accreditation agencies around the world have protocols in place to ensure those who teach are fit and proper persons. When allegations of sexual misconduct are made, fixed procedures, often involving criminal investigation, are followed to determine the verity of those allegations. Teachers may face suspension or deregistration. If a criminal prosecution ensues, criminal penalties, including imprisonment, may be imposed if

allegations are proved. The issue discussed by Mawdsley lies in the grey area of allegations that are unsubstantiated for lack of evidence. Even though the standard of proof for findings by teacher accreditation agencies may not match the criminal standard, allegations may still be difficult to substantiate to a degree sufficient to warrant disciplinary action. The vexed question is whether the names of teachers against whom allegations are made, but not proven, should be released. There is, perhaps, no clear legal or moral, right or wrong, answer to the question. There are potential unintended consequences of teacher identification in that it may lead also to the identification of an affected child. In many jurisdictions, identities of those accused of committing crimes against children are often kept confidential to protect the identity of the child, not the perpetrator. Mawdsley discusses a recent US decision, *Bellevue John Does v Bellevue School District No. 405*,[2] which examines the keeping of public records, freedom of information and privacy, and, more generally, the role of US authorities in investigating allegations of sexual misconduct by teachers. You will find the discussion interesting and will no doubt form your own considered opinion as to the appropriateness of identification of all teachers accused of misconduct.

Noeleen McNamara and Eola Barnett address another source of anxiety for educators — the competing interests in keeping drugs out of schools and in preserving the personal rights of students. McNamara and Barnett are critical of the support available to school staff as they navigate the 'legal minefield' of handling drug incidents and suggest that some education department policies may, instead of protecting staff, actually expose them to potential litigation. The authors look at the intersection between school discipline procedures and the criminal justice system and consider teacher liability issues arising from student interviews, student searches and the notification of parents and police. They offer sensible advice about the protective precautions which should be taken to minimize the risk of litigation. McNamara and Barnett suggest that significant resources must be invested, first, in the development of clear school policies and procedures which are informed by the protections inherent in the standard of proof and admissibility of evidence required by the criminal justice system and, secondly, in staff training in their implementation. Resources invested now, they counsel, will 'reap rewards' in the long term.

Sonia Allan, from the University of Adelaide, and Glenda Jackson, from Monash University, in Melbourne, provide not only a comprehensive overview of the Australian laws relating to home schooling but also a persuasive defence of home schooling as a valid option for the education of children. Their careful analysis of the research into home schooling practice, and particularly into the outcomes of home schooling, reveals that it is adopted by a range of different families from different social and economic backgrounds and for a range of reasons, but with consistently positive results for children. It is particularly interesting that research demonstrates positive outcomes in respect of the socialisation of home schooled students despite the fact that critics often suggest the potential for problems arising from limited opportunities for contact with other children. Allan and Jackson accept the legitimate interest of the state in the supervision of home schooling, and in the setting of standards in relation to registration, curriculum content and evaluation of home schooling programs, but suggest that more consistency across the Australian regulatory regimes is desirable. Certainly consistency would appropriately complement the Australian move towards a national curriculum. A revamp of the existing state regimes, or, perhaps, the creation of a national regime, would also allow for the removal, perhaps, of onerous and, the authors argue, intrusive, home inspection powers in some Australian jurisdictions.

Lelia Helms adopts a distinctive approach to legal research. She collates all court and tribunal decisions in a particular area of interest in a particular jurisdiction in a particular time frame and

analyses them to extrapolate common themes and approaches. For this issue of *IJLE* she has applied this approach to disability discrimination in education in Australia. She adds an extra layer of commentary by then comparing Australian themes and approaches to those evident in the USA. This methodology has the advantage of showing, historically, what has united decided cases across the jurisdictions, but also of predicting problems which may emerge. Helms infers from the US experience, for example, that Australian educators may anticipate a rise in litigation arising from discrimination alleged in assessment and in the preparation of students for the transition to professional life. They may also anticipate a trend towards self harm among students disaffected by deficient educational experiences. Education systems alerted to these trends by research such as that conducted by Helms may, of course, take action to avoid their materialisation.

Finally, from time to time we include a legal education article in the pages of IJLE. Such articles address the intersection between law and education from a different perspective — those interested in the training of lawyers may be informed by the expertise of educators. Many higher education institutions, and indeed many schools, both government and non-government, attract international students both to improve their internationalisation profiles and understandings, and to provide additional sources of revenue. Sophie Riley and Grace Li provide a thoughtful report of an activity to bridge the language divide for Chinese-origin international students, an activity that could be extended to any international students from non-English speaking backgrounds. With many of these students, the issue of language competence to study within a discipline fields arises. As Riley and Li note, standardised measures of language competence and experiential contexts of language acquisition may not provide sufficient language to handle both academic reading and writing tasks and classroom language conversations. Problems are compounded for students by the fact that the discipline of law is a conceptually-based field, lacking common terminologies across nations such as those shared by the scientific disciplines. Riley and Li undertook partial translation of law materials into Chinese and evaluated the success of the project. Their efforts appear to have been well-appreciated by students, and lead, also, to a bilingual text. The article provides opportunities for us all to consider the difficulties students encounter in any form of education, but particularly legal education.

We are sure you will agree that the *IJLE* once again offers a range of informative and provocative articles which demonstrate the multi faceted nature of the relationship between education and the law.

Endnotes

1 *AV v iParadigms, Ltd Liability Co*, 544 F Supp 2d 473, 478 [232 *Education Law Reporter* 176] (EDVa, 2008). See also Ralph Mawdsley and Joy Cumming, 'Plagiarism Litigation Trends in the United States (US) and Australia' (2009/in press) 21 *Education and the Law*, for focused discussion of this US case.

2 *Bellevue John Does v Bellevue School District No. 405*, 189 P 3d 139, 155 [234 *Education Law Reporter* 1007] (Wash, 2008).

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