

EDITORIAL

This issue of the *International Journal of Law and Education (IJLE)* contains an eclectic group of six papers from disparate jurisdictions: one each from the United States, South Africa, Canada, and three from the Australia, one of which is a comparative analysis with New Zealand. The common theme among all of the papers, most of which were presented at the 2019 Australia New Zealand Education Law Association (ANZELA) Conference in Cairns or grew out of earlier gatherings, is the relationship between law and education whether at the post-secondary or tertiary levels.

From the US, Charlie Russo's paper, *Trigger warnings, safe spaces, and free speech: Lessons from the United States*, examines the effect of trigger warnings and safe spaces on freedom of speech in post-secondary institutions in the US. He suggests that an attempt by some faculty members and students to shut down robust debate out of fear of offending listeners is anathema to the *raison d'être* of a university. Moreover, he maintains that university administrators "must stand up for the idea of a university as a place for the robust exchange of ideas and not yield to those who would interfere with learning".

The Donlevy and Gereluk paper, *A clash of positive and negative liberty: Denying accreditation of Trinity Western law school*, examines the legal challenges facing Canadian private religious institutions of higher education by analysing the case of Trinity Western University's (TWU) proposed Law School in the Province of British Columbia. All of the Canadian Deans of Law and various provincial Law Societies successfully argued at the Supreme Court of Canada that graduates of TWU's proposed law school should not be allowed to take up legal articles, a professional practicum required after graduation, not because they would be unqualified which was never in question, but because TWU prohibited sexual relations outside of heterosexual marriage. The analysis of the issues is taken up using the concepts of negative and positive liberty espoused by Isaiah Berlin.

Keith Thompson's paper, *Maintaining religious identity in hiring in faith-based schools: A comparative analysis of Australia and New Zealand* examines the law in both Nations in relation to safeguarding "ethos preservation in faith-based schools". He notes that private faith-based schools in Australia receive some public funding but that State support is predicated on adherence to what some might describe as progressive legislation dealing with matters such as 'the inclusion of gender-neutral stereotypes in all texts including mathematics.' He provides examples of litigation in both Nations which show how vulnerable faith based private schools are to claims that they are discriminating against anyone. Thompson ends with practical suggestions about how religious organizations in Australia and New Zealand can preserve the religious ethos in their schools, a difficult task at best.

Marius Smit's paper, *Religion in South African public schools: Ored v. Randhart primary school*, delves into the contentious issue of religious observances in South Africa's public schools. Unlike public schools in the US and which prohibit religious displays in schools or on school property, and most European faith-based schools, South Africa follows what Smit calls the "co-operative" model allowing for the practice of religious observances in public schools if attendance is "free, voluntary, equitable and in accordance with the school's policy, legislation and the South African Constitution." Via an examination of the *Randhart* case, wherein the

Plaintiff sought, among other things, to prohibit religious observances in schools, Smit provides a look into how a South African court applied the principle of subsidiarity to resolve the legal conundrum of balancing the secular and the sacred in South Africa's public schools.

John Orr's paper, *The fit and proper persons' concept in higher education law*, draws from case law from the United Kingdom and Australia seeking "to shine some light on the Australian Government's TEQSA's [Tertiary Education Quality and Standards Agency's] fit and proper person test". The first of two papers dealing with TESQA, this paper notes that the purpose of its test is to protect the public interest by in effect precluding "unfit" and "improper" people from being able to sit on public boards. Looking beyond the traditional test of honesty, knowledge, and ability, he suggests looking to the context of the situation to better assess cases under the statute. Orr also defines "unfit" and "improper" by drawing out relevant principles from case law before dealing with the question of "onus of proof" and defining the meaning of "public interest."

Sally Varnham's paper, *Working with students: Partnership for quality enhancement in Australian tertiary institutions*, is also grounded in the TESQA as an example of how legislation can have a practical impact on the campuses of tertiary institutions. This paper examines the relationship of "student engagement in institutional decision making and governance" in Australia is both an analysis and a call for authentic and systemic student engagement in "post-secondary curriculum development, strategy, [and] direction, and governance." The paper also discusses the Higher Education Provider Standards Framework (Threshold Standards) of 2015 which provides for such engagement and the research which underpins the paper - dealing with "the place of student voice in Australia."

As guest editors, we would first like to thank the National Board of ANZELA for the opportunity to prepare this issue of the *IJLE*. We would also like to thank Ms. Donna Bennett, Editorial Assistant on behalf of ANZELA, for her help in finalizing the manuscripts for publication. Next, but certainly not least, we offer our thanks to the authors for their thought-provoking and well-written essays. We trust that readers will find the articles in this issue to be of interest so as to stimulate ongoing conversation about Education and the Law in the spirit of the leadership ANZELA provides.

J. Kent Donlevy
Charles J. Russo