The Australian Journal of
INDIGENOUS EDUCATION

SPECIAL SCHOOLING for INDIGENOUS STUDENTS: a NEW FORM of RACIAL DISCRIMINATION?

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Abstract

Recent reports on Indigenous education have revealed that high proportions of students have been placed in special classes for intellectual disability or behaviour disorders. This is not an isolated phenomenon. Indigenous students in Canada and Romani children in Europe are also disproportionately represented in special schooling. This paper asks whether systemic racism, which fails to perceive cultural differences between the ethos of Australian educational systems and the experiences and abilities of Indigenous students, is the catalyst for placing many Indigenous students in special schooling, away from the mainstream. The paper applies an analysis based on anti-discrimination law to argue that while allocation on the basis of intellectual disability or behaviour disorders may not be deliberate racism, the criteria developed for the allocation may be measuring conformity to the dominant culture. If the policies underlying this segregation are unreasonable in the circumstances, they could constitute indirect racial discrimination against Indigenous students. Educational authorities could be liable in law, even though the effect on Indigenous students is unintentional and said to be for the students' "own good".

Introduction: Special schooling

The 2004 Review of Aboriginal Education in New South Wales (NSW) uncovered the startling information that Indigenous students are significantly over-represented in special schooling in NSW. For example, instead of making up 3.5% of special classes in junior secondary as would be expected from their representation in the total school population in that state (Productivity Commission, 2006, Figure 3.2), they comprise almost 40% of all students in juvenile justice classes, 20% of behaviour disorder classes, and 14% of classes for mild intellectual disability (New South Wales Aboriginal Education Consultative Group, 2004, Figure 3.4.3). As the review noted:

> The proportion of Aboriginal students placed in specialist classes and units is greater than the proportion of Aboriginal students in the student population as a whole (New South Wales Aboriginal Education Consultative Group, 2004, p. 130).

The relative percentages of Indigenous enrolments in special classes between 1996 and 2003 were charted by the Review. Over that time enrolments rose in all classes except for those for physical disabilities. Allocation of Indigenous students to classes in the juvenile justice system and for behaviour disorders both rose a significant 10% (New South Wales Aboriginal Education Consultative Group, 2004, Figure 3.4.3).

These scandalous results were not confined to the junior secondary schools. Across all classes from kindergarten to Year 12, proportionally more than twice as many Aboriginal students (4.4%) were in special classes compared with 2.1% of non-Aboriginal students (New South Wales Aboriginal Education Consultative Group, 2004, p.130).

Two years previously, the Vinson Inquiry into public education in NSW (Vinson, 2002a, b, c) had also found that Indigenous young people at school were more likely than their non-Aboriginal peers to experience high rates of allocation to special schools and classes, and to low academic streams, though no quantitative data was offered to support this finding.

As the authors of the 2004 Review blandly noted: "This phenomenon requires further research" (New

South Wales Aboriginal Education Consultative Group, 2004, p.131). It recommended that additional data be collected and research undertaken on the "numbers of Aboriginal students in special education settings and the appropriateness and effectiveness of such placements" (New South Wales Aboriginal Education Consultative Group, 2004, p. 193). A working party has been set up this year but has yet to report.

It is not the intention of this paper to provide hard evidence on how many Indigenous students are in special schooling in each state and territory. Indeed the 2004 NSW Review seems to be the only source of freely available data on this "phenomenon". Data on school students is collected federally and by the states and territories, but its parameters are often drawn on funding requirements for individual student's needs, rather than on broad categories of special schooling. Some jurisdictions do not keep statistics on the numbers of students placed in classes for behaviour disorders, as this is seen as a transient allocation. Some education departments do not have responsibility for the education of the young people in detention who comprised 40% of the NSW junior secondary Indigenous students in special classes. Nevertheless, the 2004 Review's findings are validated by submissions from Indigenous communities made to it and the Vinson Inquiry. Like the Canadian First Nations members cited below, they were concerned about the disproportionate number of their young people in special schooling (New South Wales Aboriginal Education Consultative Group, 2004; Vinson, 2002a).

The parents' submissions to the 2004 Review saw cultural difference as the reason for allocation to special classes, particularly in relation to behaviour disorders. They argued that too many of their students were disciplined, suspended or referred to behaviour programmes because schools did not have the cultural knowledge to respond appropriately to behaviour that was acceptable in Indigenous communities. The aim of this paper is to ask whether systemic racism, which fails to perceive cultural differences between the ethos of Australian educational systems and the experiences and abilities of Indigenous students, is the catalyst for placing Indigenous students in special classes. The paper adopts a legal analysis derived from anti-discrimination law to argue that while allocation on the basis of intellectual disability or behaviour disorders may not be deliberate racism, the unintentional effect is to sideline Indigenous students from mainstream education and to deny them future opportunities in work and education. Therefore it could constitute indirect racial discrimination against Indigenous students.

Lest we think the over-representation of Indigenous students in special schooling is an aberration only identified in the two NSW reviews, we need only look at other manifestations of racial discrimination in education. Historical examples include the regimes of Nazi Germany, apartheid in South Africa, segregation in US southern states, and schooling on American, Canadian and Australian indigenous reserves. More poignant, however, are the current examples. Students from indigenous and ethnic minority groups around the world are still being educated in different, and invariably inferior, teaching environments, despite their countries having ratified human rights conventions such as the United Nations *Convention on the Rights of the Child*. For example, it is the policy of the governments of the Czech Republic, Bulgaria, Romania, Hungary and Slovakia to place Romani (or Gypsy) children in remedial special classes where they are either the only students or make up the greater majority of the students, despite Roma constituting only a very small proportion of the countries' populations (European Roma Rights Centre, 2004). In its 2000 Report to the United Nations Committee on the Elimination of Racial Discrimination, the Czech government admitted that 75% of all Czech Romani children are in special schools (Committee on the Elimination of Racial Discrimination, 2000).

In legal terms this appears to be direct racial discrimination – governments treating Romani children less favourably than other children in the same or similar circumstances on the basis of their "race" or ethnic origin. The European Roma Rights Centre, a public interest advocacy group for the rights of Romani people, challenged this discrimination in the European Court of Human Rights arguing that the assignment of disproportionate numbers of Romani children to substandard, special schools for the mentally disabled in the Czech Republic contravened human rights law, denied the students the right to an education, was degrading treatment, and constituted racial discrimination in breach of the European Convention of Human Rights.

The Centre claimed that the tests used to assess the children's mental abilities were culturally and linguistically biased against Czech Roma. However, on 7 February 2006, six years after the complaint was first lodged, six of the seven judges of the Court of Human Rights held that the Czech system of special schools was not racially discriminatory: it had been implemented to help all students with learning disabilities acquire a basic education. The criterion for selection was not race, but the results of psychological tests. The judges found no evidence that the psychologists had acted other than professionally in choosing which tests should be administered to the students. They also noted that the Centre had not taken the opportunity to have the 18 applicant children reassessed with different diagnostic tools. Therefore the Centre had failed to prove the children had been discriminated against on the basis of race (***DH and Others v the Czech Republic***, European Court of Human Rights, 2006).

The dissenting judge, Judge Cabral Barreto of Portugal, held that a report from the Czech

government that Romani students with average and above-average intellect were often placed in classes for the intellectually disabled amounted to an admission of racial discrimination. He commented that once these children have been streamed into substandard education, they have little chance of accessing higher education or steady employment opportunities:

> Pupils who, for various reasons – whether cultural, linguistic or other – find it difficult to pursue a normal school education should be entitled to expect the State to take positive measures to compensate for their handicap and to afford them a means of resuming the normal curriculum. However, such measures should never result in the handicap being increased as a result of the pupil being placed in a school for children with learning disabilities (*DH and Others v the Czech Republic*, 2006, Barreto J, [4]).

Europe's highest court, the Grand Chamber of the European Court of Human Rights, has agreed to hear an appeal against this decision.

Indigenous students in special classes and schools are also common in Canada. A 2002 report, *Our children–Keepers of the sacred knowledge* (Ministers National Working Group on Education, 2002) found over-representation of First Nation students in special education programmes in provincial, territorial and on-reserve schools. The report recommended that the Minister of Indian and Northern Affairs, under the leadership of the First Nations, should investigate the effectiveness of these programmes every five years, starting immediately. This would ensure that First Nation learners were accurately identified in order to receive appropriate support to improve their long-term academic success (Ministers National Working Group on Education, 2002). Accurate data also need to be collected in Australia and the situation constantly monitored.

Anti-discrimination legislation

Australian federal, state and territory legislation prohibits two types of racial discrimination: direct and indirect. Direct discrimination is treating another less favourably on the basis of race. The indirect discrimination provisions are designed to deal with a situation where a race-neutral practice or condition has a negative effect on people of a particular ethnic background. In general, the complainant must prove four elements. First, that a term or condition has been imposed. Take, as an example, the Romani children being placed in special schools; the condition is that in order to participate in mainstream education, Czech students must achieve a score of average or above on an intelligence test. The second element is that the complainant cannot comply with that condition. In other words, a student, shown to be of "normal" intelligence on other parameters, must have been denied a place in a mainstream school on the basis of the intelligence test results. Third, there is a comparison of the proportion of students from each group who can comply with the test requirement. In the Czech case there was evidence to show that proportionally more Czech children not of Roma ethnic origin could achieve a "normal" or above score. Finally, the requirement must not be reasonable in the circumstances. In Australia, courts will consider a range of factors including available alternatives. The Roma Centre alleged a bias in the test questions in favour of the culture of the majority students. If proved, the test requirement cannot be reasonable.

This covert type of discrimination is sometimes called systemic or institutionalised racism, because it runs through the system of an organisation like a disease. It is the result of the unwitting application of criteria derived from the history and culture of the dominant group. It assumes that all people are the same and share the dominant culture. The policies and practices it generates are not intended to discriminate; their proponents believe the criteria are objective and of universal application. The effect, however, is an adverse impact on certain ethnic groups or races who are denied their human rights and fundamental freedoms. The advantage of the indirect discrimination action is that it can pick up cultural biases in favour of the dominant group by comparing the proportions of those who can comply with the criteria or norms.

In the first case heard on this type of discrimination, *Griggs v Duke Power Company* (1971), the company required prospective employees to have either a high school diploma or have achieved a score on an IQ test equivalent to those of high school graduates. The African-American plaintiffs argued that this constituted racial discrimination because it had a disproportionate effect on their job prospects. Like Australian Indigenous students, significantly fewer African-Americans had completed high school than had white students. The IQ test, drawn up by white middle class psychologists, was culturally biased against them. The company argued that the conditions of employment were intended to raise the educational standard of its workforce and had no discriminatory motive. Finding in favour of the plaintiffs the Supreme Court of the United States responded:

> Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability ... [A]rtificial, arbitrary, unnecessary barriers to employment [must be removed] when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification (*Griggs v Duke Power Company*, 1971, pp. 430-432.)

Motive is also irrelevant in Australian anti-discrimination law. Even if the tests and the provision of special schooling are ostensibly for the students' "own good", for example, to provide remedial help or to offer a practical rather than academic education, the discrimination will still be unlawful if the requirement is unreasonable in the circumstances. Therefore the practice of placing Indigenous students in special education might be a "built-in headwind" which effectively prevents them from enjoying their rights to education and work.

The next section of the paper subjects the grounds on which the decisions are made to an analysis based on anti-discrimination law. It raises the issue of whether the decision-making process is contrary to legislation prohibiting racial discrimination.

Why are Indigenous students in different classes?

The reasons given for segregating NSW students into special schools or units seem to fall into two broad categories. In practice they can overlap. The student is either:

- suffering a disability; or
- has a behaviour or emotional disorder.

Disability

Of the first category there are two types: physical or intellectual disability. Physical disabilities that might require special schooling include hearing loss, speech or vision impairment. Diagnosis is, by and large, culture-free. Where there is a possibility that cultural differences could influence diagnosis, practitioners have developed special equipment or procedures. For example, visual acuity is usually tested by the identification of letters of the Roman alphabet (the "eye chart"). However this method could lead to an incorrect diagnosis where the patient has not learnt to read, or comes from an oral culture or one that uses a different script. Alternative means of testing have been developed to offer a fair and valid assessment, for example, a test for Indigenous children which relies on the identification of the design and orientation of stylised turtles (Wildsoet et al., 1998).

Intelligence testing

Assessing intellectual disability, however, is a different issue. For over half a century there have been concerns that intelligence tests, because of their cultural bias, are unreliable for testing people from minority groups. For example, the best known and most widely used of the intelligence tests, the Wechsler Adult Intelligence Scale asks, "Who wrote Hamlet?". It does not ask a question such as:

> You are out in the bush with your wife and young children and you are all hungry. You have a rifle and bullets. You see three animals all within range – a young emu, a large kangaroo and a small female wallaby. Which should you shoot for food? (Cultural bias in intelligence testing, 2004).

In the Edward River community in far north Queensland the answer, according to the unnamed author of the *Original Australian Test of Intelligence*, is the small female wallaby because "emu is a food that may be consumed only by very old people. Kangaroos (especially large ones) may not be eaten by parents or their children. The children will get sick otherwise" (Cultural bias in intelligence testing, 2004). The author does not include the possibility that if the shooter is of the same "skin" as one of the animals he may not kill that animal because of their spiritual connection.

Even non-verbal tests initially proclaimed to be "culture-free" have been found to be based on cultural constructs peculiar to certain societies, usually those of the test developers (Benson, 2003). Linguistic difference is another variable which can influence test results. Eades (1992), Zeegers et al. (2003), and other linguists have noted that Standard English is a second language for many Indigenous people: their mother tongues are Aboriginal English, Kriol, or the original languages of this continent. However, lack of command of the dominant language can look like slow development in a monoculture such as Australia.

The 2004 Review found that in 2003 more than a quarter of junior secondary students in classes for intellectual disability (14% mild intellectual disability, 8% moderate, 4% severe) were Indigenous (New South Wales Aboriginal Education Consultative Group, 2004, Figure 3.4.3). In that same year, young people in custody in the NSW juvenile justice system participated in a voluntary health survey (New South Wales Department of Juvenile Justice, 2003, p.17). They were tested on a range of measures including tests for cognitive functioning and intellectual ability. Given the Wechsler Abbreviated Scale of Intelligence (WASI), 74% of them scored below average, compared to the 25% expected on a general sample. One hundred and thirty-two, or 57%, of the volunteers were Indigenous. Assuming the WASI results were evenly distributed between Indigenous and non-Indigenous participants, then almost three-quarters of Indigenous students in detention would have been assessed on that test as below average intelligence. The findings from these two groups – the juvenile detention centres and the in-school disability classes – suggest that NSW Indigenous students are being classified as mild to moderately intellectually impaired at a much higher rate than would be expected from their representation in the 12 to 16 year old population.

Interestingly, the 4% proportion of students in the school system with severe intellectual disability was similar for Indigenous and non-Indigenous students. The judges of the European Court of Human Rights offered an explanation for the same phenomena which they observed among the Czech students: "severe intellectual disability could be diagnosed with greater objectivity" (*DH and Others v the Czech Republic*, 2006, [39]). This is surely an indictment on the subjectivity of techniques applied to assess the range of achievement between mild and moderate intellectual disability. This grey area, into which a disproportionate number of Indigenous students are placed, needs further investigation to ascertain whether the allocation is influenced by cultural difference. It is not conceivable that Australian and Canadian indigenous students, and Romani children in four European countries, are intellectually disabled to a far greater extent than the population against which they are being measured.

Cultural bias in intelligence testing was taken into account in the 2003 young people in custody health survey. The average Verbal IQ on the WASI was 76, well below the general community average of 100. However, on the Performance (or non-verbal) IQ Scale, the detainees fell in the average range with a score of 91. The results of the Indigenous participants on the non-verbal scale were comparable to Australian norms (New South Wales Department of Juvenile Justice, 2003, pp. 17, 21).

The authors also then compared the Performance IQ with the results of a Composite Standard score derived from academic achievements in reading, spelling and mathematics (the Wechsler Individual Achievement Test-II-Abbreviated). With an expected average score of 100, 85% of the detainees fell below the average range on this test, 37% of them in the range of scores expected of people with intellectual disabilities (New South Wales Department of Juvenile Justice, 2003, p. 19). Yet the mean Performance IQ demonstrated that the participants fell within the average range on this part of the WASI (New South Wales Department of Juvenile Justice, 2003, p. 17). The authors concluded that "many young people in custody may have difficulty comprehending, communicating and problem solving using language or numbers." However, their practical reasoning including the ability to solve non-verbal problems was close to typical for that age (New South Wales Department of Juvenile Justice, 2003, p. 21).

To estimate the incidence of intellectual disability as free from cultural bias as possible, the authors of the survey divided the results into three groups: English-speaking, non-English speaking, and Indigenous background. The authors used the non-verbal Performance IQ as the measure of intelligence for the Indigenous participants and those of the non-English speaking background. They compared those scores with the Full Scale IQs of the English-speaking group, and found that across the groups 10% of the detainees fell in the intellectually disabled range, 12 Indigenous and 12 non-Indigenous (8 English-speaking and 4 non-English speaking). This is only a small sample, but given that 57% of the participants were Indigenous, they actually had a lower representation in the intellectually disabled range than would be expected. The author's conclusion was that the aspects of intelligence tests which assess academic achievement are culturally biased.

Educational authorities may run the risk of a negligence action against them for wrongly allocating students. In the United States, students have alleged a breach of the school's duty of care after being misdiagnosed as intellectually disabled and placed in special classes. These cases have by and large failed because of public policy considerations: courts do not want to open the "floodgates of litigation" to educational malpractice suits. Nevertheless the law of negligence is constantly expanding, and new categories of liability are found every year. It is possible that such a case could succeed in the future.

The alternative path for a student would be to make a complaint of discrimination. In a recent Federal Court case on indirect disability discrimination, a hearing impaired student who was unable to comply with the educational authority's unreasonable requirement that all students receive their education in English was awarded $64,000. This sum included $40,000 for loss of future earning capacity (*Hurst and Devlin v Education Queensland*, Federal Court, 2005).

Teachers' assessments

The role of educators' preconceived ideas about Indigenous capabilities cannot be discounted. From 1788 onwards, governments and missionaries declared that Indigenous children were unteachable. They made no attempt to examine the nature of their material or their method of teaching. It was easier to characterise Indigenous students as "child-like", "lazy", or "in need of white intervention" (Norris, 2006). A 2004 report which investigated Indigenous education in Queensland pointed to inherent prejudices in an education system which, despite its expressed commitment to quality education for all students, is prepared to accept Indigenous underachievement as normal (Queensland Ministerial Advisory Committee for Educational Renewal, 2004). The Committee suggested that institutional apathy arose from ignorance of Indigenous children's capabilities, or, at worst, from racist beliefs that Indigenous learning capacity was inferior to other students'. The Vinson Second Report (Vinson, 2002b) also noted that teachers underestimate academic talent among those of low socio-economic status and from Aboriginal and Torres Strait Islander backgrounds.

Treating a person less favourably than another on the basis of a stereotype, even if not true, is

prohibited by anti-discrimination legislation. In this case the assumption is that Indigenous students lack intellectual ability. The less favourable treatment is that educators are not applying the same measures of achievement to Indigenous and non-Indigenous students (Queensland Ministerial Advisory Committee for Educational Renewal, 2004). This is direct discrimination. Poor Indigenous school performance as a given needs to be critically assessed.

Indirect racial discrimination may also be at play here if students are being placed in special classes based on their incapacity to replicate the majority culture, rather than on their intelligence. A policy under which it is necessary to conform to mainstream norms in order to have access to mainstream education is assimilationist, a government policy ostensibly abandoned in the 1970s. It is unreasonable in the circumstances. The criteria for placement need to be examined for cultural bias by Indigenous education experts.

The allocation to special schooling on the basis of intellectual disability may be the result of two interacting and potentially destructive forces: apparently race-neutral assessments, and the implementation of the assessment outcomes by persons who may be operating on untested beliefs about Indigenous students' capacities. The effect is to segregate Indigenous students from mainstream education.

Behaviour or emotional disorders

In this category are the students placed in special classes because they are behaving in an unacceptable manner. One could also include Indigenous young people who are in the juvenile justice system, because their behaviour has been found by judges or magistrates to be at the extreme of what the criminal law will tolerate.

School behaviour

Submissions to the 2004 Review were critical of the "tendency to respond to student disengagement with special programs rather than addressing the core problem of mainstream schooling" (New South Wales Aboriginal Education Consultative Group, 2004, p. 96). In their submissions to the Vinson Inquiry, Indigenous parents pointed to the frequency with which their children were classified as having emotional or behavioural disorders (Vinson, 2002c). They claimed that teachers with limited knowledge of Aboriginal culture were using schools' discipline policies to refer Indigenous students to special programmes for behaviour problems, when the real problem was cultural difference. It has also been suggested that allocation to special classes is used as a way of managing staff shortages or endemic disciplinary problems. However, without clear data it cannot be said whether this management strategy exists, or that it falls disproportionately on Indigenous students.

The juvenile justice system

Despite Indigenous young people representing only 3.5% of the total school population in NSW (Productivity Commission, 2006, Figure 3.2), 40% of the female and 34% of the male juvenile detainees in that state in 2002–3 were Indigenous (New South Wales Aboriginal Education Consultative Group, 2004, Table 3.4.5).

Many studies have been done on why Indigenous young people are over-represented in the juvenile justice system. As early as 1989, Gale and Wundersitz found that Indigenous youths in South Australia were treated more harshly than white youths at all levels of the system from apprehension by the police to the Children's Aid and Screening Panels set up to channel young offenders away from detention. Even where the Aboriginal youth had no previous history of trouble there was an 80% to 90% chance of being referred to court for most offences. In fact, the offence which attracted the highest court appearances was not theft, breaking/entering and stealing, drug or liquor possession and use, but the "street" offence of disorderly and offensive conduct. One hundred percent of Aboriginal youths charged with this offence were sent to the Children's Court. White youths had a half to two-thirds the chance of court referral for the same offences. While the researchers were not prepared to conclude that racial discrimination was the major factor influencing the judicial system outcomes, they did find that:

> differential treatment by police at the point of arrest and that Screening Panels, far from countering police action, actually compound[ed] the already disadvantaged position of Aboriginal youths (Gale & Wundersitz, 1989, p. 18).

Seventeen years on, Indigenous offenders are still being treated differently on the basis of their race.

Applying the law

Indigenous students are placed in special classes on the basis of what is believed to be culturally neutral criteria. This is not the view taken by Indigenous parents. Are they correct? Could it be argued that the students are unable to comply with unreasonable standards based on a culture different from theirs?

The first element of indirect discrimination is that a term or condition has been imposed. Therefore in order to obtain a mainstream education, a student has to conform to Eurocentric cultural norms embedded in intelligence tests, and educators' expectations. Second, can Indigenous students comply with these

requirements? If the aim of education is assimilation then it might be argued that if Indigenous students want to participate in mainstream classes then they need to learn to comply with the criteria by behaving differently, or passing the intelligence tests. However, the judicial interpretation of the element extends beyond the physical ability to comply. The element asks whether the complainants can comply in conformity with their background or culture (*Mandla v Dowell Lee*, House of Lords, 1983), adherence to cultural imperatives or other attributes related to their "race" (*State Housing Commission v Martin*, Court of Appeal Western Australia, 1998), or their particular needs or abilities (*Waters v Public Transport Corporation*, High Court, 1991). An important interpretation of this element was recently handed down by the Full Court of the Federal Court. The judges held that just because a hearing impaired student could "cope" in the class did not mean she could comply with the condition imposed: a "child may still be seriously disadvantaged if deprived of the opportunity to reach his or her full potential and, perhaps, to excel" (*Hurst v State of Queensland*, Full Court Federal Court, 2006, [125]). This could apply to an Indigenous student placed without justification in special schooling. Those circumstances would deny the student the opportunity to reach his or her full potential and would constitute a serious disadvantage.

The third element requires proof that a higher proportion of non-Indigenous school students can meet the criteria. In the Victorian Sinnapan case (*Sinnapan v State of Victoria*, Victorian Equal Opportunity Board, 1994) the Minister of Education decided to close Northland College and transfer the students to mainstream schools. The Indigenous students successfully argued that non-Indigenous students would find it easier to conform with the new schools' Eurocentric regimes because their hierarchical systems reflected those students' home culture.

Are the requirements reasonable? Just because the tests are in common use, or because sending behaviour problems out of the classroom has always been done, does not make them reasonable in the eyes of the law. The law will look at available alternatives. The authors of the 2003 juvenile justice health survey demonstrated that it was possible to find an equitable measure of Indigenous achievement mostly free from cultural bias. If this can be done, then Indigenous students who have been wrongly allocated to special schooling could mount a case against the educational authorities for indirect discrimination on the basis of race.

Exceptions to the law

State and federal anti-discrimination legislation provide exceptions, which, if successful, will override the effect of the legislation. An exception can apply where there is an Act which was passed before the anti-discrimination legislation. This was invoked by the Minister in *L. v Minister for Education for the State of Queensland* (Queensland Anti-Discrimination Tribunal, 1996). L. suffered from severe intellectual impairment; however, her mother wanted her to be educated in a mainstream school. Even though teacher's aides were employed to help, L.'s teachers were almost exclusively engaged in caring for her physical and intellectual needs to the detriment of the other children. L.'s mother rejected an assessment which recommended special schooling. The Regional Director then suspended L. from school, relying on the *Education (General Provisions) Act 1989* (Qld) which allows suspension on the grounds of "conduct prejudicial to the good order and discipline of the school". The Tribunal held that even though the suspension discriminated on the basis of impairment, the provision which gave authority to suspend students was in existence at the time of the passing of the Queensland *Anti-Discrimination Act 1991*. Therefore the Director could rely on this exemption.

Another exception is to be found in the High Court case of *Purvis v NSW Department of Education and Training* (2003) where, in similar circumstances, the student was expelled from a state secondary school. The High Court held that the Principal had a duty of care towards teachers and other students to protect them from violence from the student. This duty was higher than the legislative obligation not to discriminate on the basis of disability. Therefore, if an Indigenous student had been placed in a special class or school because he or she was violent or behaving in a manner prejudicial to good order and discipline the exceptions would override the school's discriminatory conduct.

Special measures

The 2004 NSW Review found that many Indigenous communities rejected the idea of an education that would award alternative credentials to their students. They asserted the right of their children to participate in the same courses as other students. However, some submissions argued that in certain circumstances there could be separate special classes for Indigenous students where there were sufficient numbers. These classes could engage the community in the development and delivery of the curriculum, and would allow a focus on Indigenous cultural education and practical living skills (New South Wales Aboriginal Education Consultative Group, 2004).

In effect, the parents are suggesting racially segregated classes. This is contrary to the law because the Indigenous students would be treated less favourably on the basis of their race, as they would be offered different schooling. However, international human rights conventions and Australian domestic

law recognise that treating everyone the same does not eliminate all discriminatory barriers. Therefore the law allows an exception for affirmative or "special" measures so long as certain requirements are fulfilled: the measures must be necessary for the advancement of group's human rights; they must not lead to the maintenance of separate rights for different racial groups; and the measures must not continue after the objectives for which they were taken have been achieved (*International Convention on the Elimination of all Forms of Racial Discrimination*, 1966, Article 1(4)). Subsequent case law has emphasised that the impetus for the special measure must come from the group itself and not be imposed by another party such as government (*Gerhardy v Brown*, 1985). It is this last requirement which allows exceptions to racial discrimination legislation where communities have, for example, chosen to be alcohol-free. If the parents were to establish special classes based on cultural principles, this could be seen as a special measure for the advancement of the students' right to education, so long as it complies with the legal requirements.

The adverse effects of being classified as in need of special schooling

A disproportionate number of Indigenous students are not enjoying an equal right to education; instead, they are accumulating disadvantage. Some of the adverse effects on their present and future emotional, educational and employment prospects are discussed below.

a. Indigenous students vilified as not intelligent by other students

In anti-discrimination law "disability" is defined to include a disorder which results in the person learning differently from a person without the disorder. The definition covers disabilities which are imputed even if they do not exist. However, the legislation offers little protection if Indigenous students are vilified by other students on the basis of disability: school bullies are not liable for discrimination. The *Disability Standards for Education*, 2005 were passed last year by the Federal Parliament. Education providers are obliged to comply with the standards including developing strategies to support the disabled student in an environment free from harassment and victimisation. However, like most Australian anti-discrimination legislation, sanctions in the standards are directed at educational authorities, not at students. Nor can schools be vicariously liable for the acts of its students because they are not its agents or employees. Therefore Indigenous students have to rely on schools' internal disciplinary measures to protect them from abuse.

b. Indigenous students perceived as not intelligent by teachers

As discussed above, the unconscious or conscious view of many teachers is that Indigenous students cannot succeed at school. This can result in low expectations and institutional disinterest in Indigenous education.

c. Indigenous students do not see themselves as intelligent

The worst effect of systemic racism is that failure becomes internalised – its victims begin to believe that they cannot succeed. The Canadian Supreme Court described this effect:

> [It] results from the simple operation of established procedures ... none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (*Action Travail des Femmes v Canadian National Railway Co*, 1987, p. 1139).

When these beliefs coincide with adolescence, the time when young people are seeking their identity, a school environment that pays lip service to Indigenous culture but rewards a different one, undermines Indigenous students' feelings of self-worth. The NSW 2004 report noted that students referred to specialist facilities lost the will to attend (New South Wales Aboriginal Education Consultative Group, 2004).

d. Special schooling and the criminal justice system

The Royal Commission into Aboriginal Deaths in Custody (Johnson, 1991) found that the disproportionate numbers of adult prisoners who were Indigenous had low levels of educational achievement. The 2003 NSW health survey of young people (Indigenous and non-Indigenous) in custody found that 75% had left school before the end of Year 9, and that 39% of males and 50% of females had been in special schools or classes before being taken into juvenile custody (New South Wales Department of Juvenile Justice, 2003, p. 18.). The NSW Review of Aboriginal education noted that by the time young people are in the juvenile justice system they have lost all interest in education (New South Wales Aboriginal Education Consultative Group, 2004).

A 1995 report from the Australian Institute of Criminology reached the conclusion that Indigenous people who did not complete the compulsory years of secondary school were 130 times more likely to be in prison than non-Indigenous people who did not

leave school early. As the authors state, "improved educational attainment could also have a significant impact on imprisonment rates" (Walker & McDonald, 1995, p.5). Early intervention is needed.

e. A different type of education

Once placed in these classes the students are offered a qualitatively different type of education, one from which they have little chance of regaining the mainstream before they finish their education. This impacts on their future education and employment prospects, as well as on their self-esteem.

f. Prejudices are reinforced

An over-representation of Indigenous students in special schooling allows some members of the public to give vent to their underlying racial prejudices. These are backed up by pseudo-scientific deterministic pronouncements such as Indigenous students will never succeed because their mother's pre-natal drinking has irreparably damaged their brains; or that their disabilities are inherited from their parents because they could not succeed at school either.

g. Special schooling builds resentments between parents and schools

In their submissions to the NSW inquiries parents raised the issue of consent to special schooling. They felt that students should only be referred to specialist classes and units "if the programs are seen by the family to be meaningful, culturally appropriate and planned in consultation with the family and the local community" (New South Wales Aboriginal Education Consultative Group, 2004, p. 132). They argued that schools which valued Aboriginal cultural diversity were more likely to help young people achieve their goals. Research needs to be done to assess whether supportive schools do in fact have fewer referrals to special classes.

Conclusion

Though the right to their land and the right to utilise its wealth are the most important economic imperatives for Indigenous people, education is also an important key to economic development. However, an unacceptably large proportion of Indigenous students are in special schooling. This should be sending a signal that something is wrong in the assignment process. This paper suggests that this may be due in part to systemic racism. Using the lens of anti-discrimination law it has argued that policies and practices which are allotting Indigenous students in disproportionate numbers to special classes may be based on criteria which measure conformity to the dominant culture. If the policies are unreasonable in the circumstances they could constitute indirect discrimination on the basis of race, and educational authorities could be liable in law.

However, these hypotheses must be tested. In order to do so, a number of recommendations for further research have been made. They include an assessment and evaluation by Indigenous educators of the bases on which Indigenous students are placed in special classes. National standards could be developed against which the reasons for placing students in special classes could be tested for their reliance on embedded cultural expectations and assumptions.

Hand in hand with this is the need for the collection of national data on special schooling. It is possible that by adopting an approach based on assessing the special needs of the individual student, educational authorities are overlooking the situation where there is a higher proportion of Indigenous students than non-Indigenous in special classes, and possibly more Indigenous students receiving special schooling than mainstream. Educational policy should be informed by freely available statistics about special schooling, its outcomes and benefits. Only then can it be said that all Australian students have the right to enjoy equal opportunity in education.

References

Action Travail des Femmes v Canadian National Railway Co [1987] 1 SCR 1114.

Benson, E. (2003). Intelligence across cultures: Research in Africa, Asia and Latin America is showing how culture and intelligence interact. *American Psychological Society OnLine Monitor on Psychology, 34*(2). Retrieved 5 August, 2006, from http://www.apa.org/monitor/feb03/intelligence.html.

Committee on the Elimination of Racial Discrimination. (2000, April). *Reports submitted by States Parties under Article 9 of the Convention. Fourth periodic report of States parties due in 2000.* Czech Republic. CERD/C/372/Add.1, 14 April, 2000.

Cultural bias in intelligence testing. (2004). Retrieved 5 August, 2006, from http://www.wilderdom.com/personality/intelligenceCulturalBias.html.

DH and Others v the Czech Republic, no. 57325/00, [2006]ECHR 113.

Eades, D. (1992). *Aboriginal English and the law.* Brisbane: Queensland Law Society.

European Roma Rights Centre. (2004). *Stigmata: Segregated schooling of Roma in Central and Eastern Europe.* Budapest, Hungary: European Roma Rights Centre.

Gale, F., & Wundersitz, J. (1989). The operation of hidden prejudice in pre-court procedures: The case of Australian Aboriginal youth. *Australian and New Zealand Journal of Criminology, 22*(1), 1-21.

Gerhardy v Brown (1985) 159 CLR 70.

Griggs v Duke Power Co 401 US 424 (1971).

Hurst v State of Queensland [2006] FCAFC 100.

Hurst and Devlin v Education Queensland [2005] FCA 405.

Johnson, E. (1991). *Royal Commission into Aboriginal Deaths in Custody: National report* (Vol. 2). Canberra: Australian Government Publishing Service.

L. v Minister for Education for the State of Queensland (1996) EOC 92-787.

Mandla v Dowell Lee [1983] 2 AC 548.

Minister's National Working Group on Education. (2002). *Our children – Keepers of the sacred knowledge: Final report*. Ottawa, Ontario: Department of Indian Affairs and Northern Development. Retrieved 5 August, 2006, from http://dsp-psd.pwgsc.gc.ca/Collection/R41-9-2002E.pdf.

New South Wales Aboriginal Education Consultative Group. (2004). *Freeing the spirit: Dreaming an equal future (Yanigurra Muya: Ganggurrinyma Yaarri Guurulaw Yirringin.gurray)* [Review of Aboriginal Education 2003-2004]. Darlinghurst, NSW: NSW Department of Education and Training.

New South Wales Department of Juvenile Justice. (2003). *2003 NSW young people in custody health survey: Key findings report*. Sydney: Department of Juvenile Justice.

Norris, R. (2006). *The more things change ...: Continuity in Australian Indigenous employment disadvantage 1788-1967*. Unpublished PhD thesis, Griffith University, Brisbane.

Productivity Commission. (2006). *Report on government services 2006: Part B education*. Retrieved 5 August, 2006, from http://www.pc.gov.au/gsp/reports/rogs/2006/education/index.html.

Purvis v NSW Department of Education and Training [2003] HCA 62.

Queensland Ministerial Advisory Committee for Educational Renewal. (2004). *Report on Indigenous education: Recommendations to the Minister for Education and the Minister for the Arts*. Brisbane: Queensland Government Department of Education and the Arts.

Sinnapan v State of Victoria (1994) EOC 92-567.

State Housing Commission v Martin [1998] WASCA 327.

Vinson, T. (2002a). *Inquiry into the provision of public education in New South Wales. First Report (May)*. Sydney: New South Wales Teachers Federation and the Federation of P&C Associations of New South Wales. Retrieved 5 August, 2006, from http://www.pub-ed-inquiry.org/reports/final_reports/FIRST_REPORT.pdf

Vinson, T. (2002b). *Inquiry into the provision of public education in New South Wales. Second Report (July)*. Sydney: New South Wales Teachers Federation and the Federation of P&C Associations of New South Wales. Retrieved 5 August, 2006, from http://www.pub-ed-inquiry.org/reports/final_reports/SECOND_REPORT.pdf

Vinson, T. (2002c). *Inquiry into the provision of public education in New South Wales. Third Report (September)*. Sydney: New South Wales Teachers Federation and the Federation of P&C Associations of New South Wales. Retrieved 5 August, 2006, from http://www.pub-ed-inquiry.org/reports/final_reports/THIRD_REPORT.pdf

Walker, J., & McDonald, D. (1995). *The over-representation of Indigenous people in custody in Australia* [Trends and issues in crime and criminal justice Report No. 47]. Canberra: Australian Institute of Criminology.

Waters v Public Transport Corporation (1991) 173 CLR 349.

Wildsoet, C. F., Wood, J. M., & Hassan, S. (1998). Development and validation of a visual acuity chart for Australian Aborigines and Torres Strait Islanders. *Optometry and Vision Science, 75*, 806-812.

Zeegers, M., Muir, W., & Lin, Z. (2003). The primacy of the mother tongue: Aboriginal literacy and non-standard English. *The Australian Journal of Indigenous Education, 32*, 51-60.

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