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TESTING the SOCIAL JUSTICE GOALS of EDUCATION: a ROLE for ANTI-DISCRIMINATION LAW

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Abstract

Policy documents on Indigenous education include statements such as equitable access to education, participation and outcomes that can be broadly described as social justice goals. However, there has been little academic analysis of how these goals are to be achieved. This paper proposes that the indirect discrimination provisions in Australian anti-discrimination law can provide a framework in which the goals can be evaluated against the endemic effects of dominant power on mainstream education. The legal provisions are designed to assess whether a policy or practice might adversely affect certain groups in our society distinguished by, for example, their "race". If a higher proportion of persons who do not have that particular attribute can comply with the policy or practice, and the demand is unreasonable in the circumstances, then this will constitute unlawful indirect discrimination. This paper analyses three social justice strategies which appear to be race-neutral and to apply equally to all students, Indigenous and non-Indigenous: Indigenous studies in the curriculum, using Standard English in the classroom, and instilling Australian values. The outcome suggests that these approaches may have an adverse impact on Indigenous students, and may even be undermining the social justice goals they set out to deliver.

Introduction

In 1988 a national task force was established to develop a coherent policy approach to Indigenous education. In setting its long-term goals for the National Aboriginal and Torres Strait Islander Education Policy (Department of Employment, Education and Training, 1989), the task force identified four major social justice themes:

- involvement of Indigenous people in educational decision-making;
- equality of access to educational services;
- equality of educational participation, commensurate with all Australians; and
- equitable and appropriate educational outcomes.

While the first relates mainly to engaging Indigenous adults in the planning and implementation of the education of their young people, the other three can be seen as particularly aimed at Indigenous students. These three goals reappear in many education policy documents, reports, reviews and strategic plans, for example, they set the benchmarks for the four *National Reports to Parliament on Indigenous Education and Training, 2001-2004* (Department of Education, Science and Training, 2002-2006). Whether the implementation of these three goals can produce social justice for Indigenous students is the subject of this paper.

The third goal, equity of educational participation, specifically refers to a benchmark measured against non-Indigenous students. However, all three include the words "equality" or "equitable" which denote "even", "level", and "fair". Therefore I would suggest that their common objective is to bring Indigenous students to parity with non-Indigenous students. This view is reinforced by the *Adelaide Declaration* signed by Ministers of Education from state, territory and federal governments 10 years after the National Policy. It explicitly states that in the twenty-first century the socially and culturally just school will offer Aboriginal and Torres Strait Islander students "equitable access to, and opportunities in, schooling so that their learning outcomes improve and, over time, match those of other students" (Ministerial Council on Education, Employment, Training and Youth Affairs, 1999, paragraph 3.3).

Policy goals must of course be actualised through strategic plans and programmes if they are to have any effect. However, as Downey and Hart (2005) note, there has been little academic analysis of how these social justice goals are to be implemented or achieved. There is even less discussion about how to measure their success in relation to Indigenous students, except in terms of increased attendance, or high school completions. The approach of this paper is to evaluate three social justice teaching strategies in terms of whether they can achieve parity between Indigenous and non-Indigenous students. To do this I apply a legal analysis based on anti-discrimination legislation and case law. The results suggest that these strategies may in fact be detrimental to Indigenous students, and may be undermining the very social justice goals they set out to deliver.

Measuring social justice

It is apparent that many Indigenous parents take a different view from governments of what constitutes equality in education. Participants in my workshop at the 2006 (Re)contesting Indigenous Knowledges and Indigenous Studies Conference identified much broader goals than access, outcomes and participation. They wanted their young peoples' education to include: "having the same opportunities to thrive and strive"; "having a better life than me – a balanced life, rounded, more than goal-oriented"; "having the skills to operate across different environments so that the young people have choice"; "schooling where our Indigenous identity is reinforced, at present there is no frame of reference for urban schools to recognise and accept Indigenous children"; "informed choices, knowing your place within your culture"; and "a relevant curriculum, a curriculum that is true", for example, that it teaches the real history of Australia.

Shared Responsibility Agreements also provide documentation of Indigenous peoples' aspirations for their youngsters' education: Mamaruni School, Minjilang in the Northern Territory, wanted "the best possible education for their children" (Australian Government, 2005); Gelganyem, WA, aims to expand "educational opportunities for their young people" (Australian Government, 2005); and Port Augusta and Davenport, SA, want to support "their young people to finish school and enter further education as a pathway to meaningful employment" (Australian Government, 2005).

The Indigenous parents' goals do not talk of measuring "outcomes" against non-Indigenous students. They are more holistic: they speak of balance, truth, meaning, and identity. They are in tune with education as a means of affirming and passing on knowledge as expressed in the *United Nations Declaration on the Rights of Indigenous Peoples* (United Nations Human Rights Council, 2006), unfortunately rejected by the United Nations General Assembly in November 2006: "Article 13(1): Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures".

By contrast, governments set goals which can be quantified; for an example, see Part 2 of the *Indigenous Education (Targeted Assistance) Act 2000* (Cth) where the role of the four goals listed above, plus the further goal of culturally appropriate education services, is to provide the parameters within which the Federal Government will pay organisations for advancing the goals. In this view of education, equity of access can apparently be measured by pointing to how much money has been spent on new schools or classrooms in remote and rural areas, computers, and the "rolling-out" of information and communications technology; "equitable and appropriate outcomes" can be demonstrated by reference to employment statistics, high school completions, enrolments in post-secondary education, and results on literacy and numeracy tests; and participation is shown by numbers of enrolments, attendance and grade progression compared with other Australian students (e.g., Department of Education, Science and Training, *2003 National report to Parliament on Indigenous education and training*, 2002-2006, pp. 26-32).

If governments decide these goals are not being achieved, or are not moving quickly enough, they turn to punitive measures as a means of enforcing compliance, ignoring their own policy objective of consulting Indigenous people. For example, the 2006 Federal Budget threatened the withdrawal of Abstudy if students didn't attend school (Australian Government, 2006), even though there are many reasons for absences beyond the control of Indigenous people, for example, racism, illness, bereavement, itinerant parents looking for work, and distance from secondary schools. A Federal Government "think tank" recommended the closure of remote communities claiming schools are the only reason for their existence (Johns, 2006). In Shared Responsibility Agreements, ostensibly developed by governments as equal partners with communities, government ministers have turned what Indigenous communities meant to be a reward for attending school into a punishment under its "no school, no pool", "no school, no sport", and "no school, no scouts" rules (ABC Radio National, 2004; ABC Radio National, 2005; de Plevitz, 2006a).

Delivering social justice programmes

The anti-discrimination legislation binds the Crown in every state, territory and federally (for example, *Racial Discrimination Act 1975* (Cth), section 6; *Anti-Discrimination Act 1991* (Qld), section 3). This means that all Australian governments which provide funding and run schools, colleges, and universities are subject

to anti-discrimination or equal opportunity legislation. In most, but not all jurisdictions, private educational authorities are also bound by the Acts.

There are two ways in which educational authorities might to try to achieve social justice for Indigenous students without infringing anti-discrimination or equal opportunity law. The first is through special measures aimed specifically at assisting Indigenous students to reach the goals of true equality. In international human rights treaties such as the International Convention on the Elimination of all forms of Racial Discrimination (United Nations, 1966), signed by Australia in 1975, the express aim of these special measures is to advance the human rights of a particular group. Because the measures apparently treat one group more favourably than another, they are *prima facie* racially discriminatory. However, both international law and Australian domestic anti-discrimination law recognise that treating everyone the same does not necessarily create real equality. Therefore all Australian anti-discrimination Acts allow exemptions for programmes and practices aimed at advancing certain groups' human rights. This exemption can be relied upon as long as the special measure does not lead to separate rights for different racial groups, nor continue after its objectives have been achieved (e.g., International Convention on the Elimination of all forms of Racial Discrimination, United Nations, 1966, Article 1(4); *Racial Discrimination Act 1975* (Cth), section 8; *Anti-Discrimination Act 1991* (Qld), section 105). 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).

In the context of Australian education, Indigenous communities strongly advocate and are often responsible for the implementation of special measures in schools. These include the employment of Aboriginal Education Workers (AEWs), using Aboriginal English in schools, culturally appropriate educational services and units, invitations to elders to provide classes for Indigenous students based on cultural principles, health and meal programmes, and scholarships and rental assistance for tertiary students.

A large and mainly quantitative study published in 2006, *Improving the educational experiences of Aboriginal children and young people* (Western Australian Aboriginal Child Health Survey, 2006) collected data from 5,289 Indigenous children living in 1,999 households in Western Australia. In relation to some of the special measures which had been adopted in Western Australian schools, such as AEWs and Aboriginal English, it concluded that they were not assisting Indigenous students' advancement, and recommended that they be abandoned. This recommendation disregards the consultation goal of the National Policy, and the fact that these measures were introduced at the initiative of Indigenous people who strongly believe these strategies assist their children to adapt and learn. As Dr Jill Milroy, Dean of the School of Indigenous Studies, and Associate Professor Helen Milroy, Director of the Centre for Aboriginal Medicine and Dentistry, both of the University of Western Australia, point out in their Preface to the report, Indigenous parents are seeking a holistic approach to the right to education for their children, not just the "results" or "outcomes" so beloved of many policy makers (Western Australian Aboriginal Child Health Survey, 2006, pp. xxi-xxiv).

The second way in which educational authorities might avoid liability for what appears to be discrimination in favour of Indigenous students is to try to achieve social justice by offering the same quality education to all students. Here the expectation is that an inclusive education that acknowledges diversity (Ministerial Council on Education, Employment, Training and Youth Affairs, 1999, paragraph 3.5) and is free from the effects of negative forms of discrimination (Ministerial Council on Education, Employment, Training and Youth Affairs, 1999, paragraph 3.1) will effect equality of access, participation and outcome. It is this approach which will be examined in this paper by applying the elements of indirect discrimination to programmes involving Indigenous studies, using Standard English as a means of encouraging participation in the classroom, and instilling Australian values. My aim is to uncover the endemic effects of the political and social power that informs mainstream education, and to provide a framework in which educators can gain a better understanding of the underlying assumptions on which their practices rest.

Anti-discrimination law

Two different types of racial discrimination are prohibited by anti-discrimination law. Firstly, direct discrimination occurs if one person is treated less favourably than another without the first person's race in the same or similar circumstances (for example, *Anti-Discrimination Act 1991* (Qld), section 10(1)). There is no doubt that less favourable treatment on the basis of race still flourishes in schools, both overtly and covertly. However, the direct discrimination provisions are not very useful as a tool for assessing equality of opportunity because they are usually limited to individual complaints of racism.

The second type is covered by the indirect discrimination provisions which exist in every state, territory and federal anti-discrimination Acts (*Anti-Discrimination Act 1991* (Qld), section 11(1); *Racial Discrimination Act 1975* (Cth), section 9(1A)). They consist of four major elements, all of which must be proved:

- a person imposes or proposes to impose a term, condition or requirement;
- with which a person with an attribute (here "race")

cannot comply;
- a higher proportion of people without the attribute can comply with the condition or term; and
- the term is not reasonable in the circumstances.

In effect, the legal provisions are asking, does a practice or policy disproportionately affect the non-dominant group of people, and if so, can it be justified? The provisions do this by assessing the extent to which people such as Indigenous students can comply with the requirements imposed in comparison with other students, and by asking whether the requirement is reasonable in the circumstances. In assessing reasonableness, courts will take into account matters such as cost and availability of alternative ways of achieving the organisation's goals (e.g., *Anti-Discrimination Act 1991* (Qld), section 11(2)), and benefit to society (*Cocks v State of Queensland*, 1994).

Creating substantive equality

Providing equality of access, participation and outcomes by treating everyone the same does not take into account situations where apparently neutral and equal treatment actually adversely impacts on some groups in our community. To give a case example, Mr Kevin Cocks relies on his wheelchair to get around. The State of Queensland planned to build a Convention Centre in Brisbane with a number of entrances, some of which had lifts. At the main entrance, however, there was no lift, but a set of 27 steep stairs. Some distance away was another entrance with lifts for handicapped persons.

Before the Centre was built, organisations which advocate for the rights of disabled people warned the government and the builder that the main access was not adequate. They argued that a significant proportion of people would be unable to use the main entrance or have difficulty with it, and that it would be undignified that persons with impairments such as Mr Cocks', the aged and infirm, and families with strollers and prams should have to "go around the back" to get into a major public building. The planned main entrance was not suitable for a ramp as it was too steep.

Before the building was finished, Mr Cocks made a complaint of indirect discrimination (*Cocks v State of Queensland*, 1994). The parties did not reach agreement in the compulsory conciliation conference, so the issue went to a public hearing in the Queensland Anti-Discrimination Tribunal. Justice Atkinson found that one set of people was not being treated less favourably than another; in fact the requirement to use steps to go in the main entrance applied to everyone equally. She found however that there was clearly an adverse impact on a number of groups in the community.

Her Honour held that to achieve substantive or real equality the State of Queensland must provide lifts at the main entrance:

> The benefit to the impaired is that they would feel welcomed into a major public building and would not be excluded in fact from the principal entrance used by others. It would enhance their rightful acceptance as members of the community with equal dignity and worth (*Cocks v State of Queensland*, 1994, pp. 77, 284).

I argue below that substantive or real equality in education cannot be achieved where Indigenous students are required to participate in social justice programmes offered equally to everyone but which may in fact pose threats to their dignity.

It is not necessary to prove intention to discriminate; the requirements with which students have to comply are usually unwitting and are based on practices and policies developed by those in power whose perception of the world may not include contact with persons of other cultural beliefs, practices, history or experiences. A case example involving a school is that of the English schoolboy, Gurinder Singh Mandla in *Mandla v Dowell Lee* (1983). The assumption here was that all boys attending a certain private school would be able to wear the school uniform. Gurinder, who was a Sikh, wore a turban for religious and cultural reasons. His enrolment at the Park Grove School was rejected on the grounds that he would not be able to wear the compulsory uniform as it included a cap. The demand that the boys wear caps was not motivated by racism or malice; it was just common practice in many English schools. However the House of Lords held that it was unreasonable in the circumstances, for example, there was no need for a cap to protect from the English sun. They ordered that his enrolment be reconsidered by the school. It is clear that having to comply with an apparently simple "race-neutral" demand such as wearing a uniform can create a homogenous organisation or institution that unreasonably excludes some members of our society. The outcome is known as institutional or systemic racism because it infects the whole organisation.

Applying the law

In the next section I examine three social justice strategies: including Indigenous studies in the curriculum, using Standard English in the classroom, and learning Australian values. Applying the lens of indirect discrimination law may help alert educators to the existence and effects of systemic racism.

1. Teaching Indigenous studies as part of the curriculum

The Federal Government's latest *National report to Parliament on Indigenous education and training, 2004* (Department of Education, Science and Training, 2002-2006) champions "a curriculum that ... explicitly

values Indigenous cultures" (p. 41). This strategy is endorsed in principle by all state and territory governments. As the intergovernmental Ministerial Council put it when drafting the *Adelaide Declaration* in 1999, all students will learn to appreciate the traditional and contemporary culture of Indigenous people, acknowledge the value of those "cultures to Australian society and possess the knowledge, skills and understanding to contribute to and benefit from, reconciliation between Indigenous and non-Indigenous Australians" (Ministerial Council on Education, Employment, Training and Youth Affairs, 1999, paragraph 3.4).

These objectives have been implemented at school level by including Indigenous studies in the curriculum. For example, Action 7 of the Western Australian report recommends "a meaningful Aboriginal studies curriculum to increase the knowledge of all Australians about Aboriginal culture and history" (Western Australian Aboriginal Child Health Survey, 2006, p. 512). How detailed or comprehensive the programmes are, and how they are monitored, depend on the school. Because of the shortage of Indigenous teachers, the unit is often taught by a non-Indigenous teacher.

In indirect discrimination terms the condition imposed is that in order to "appreciate and understand history, cultures and identity" (Department of Education, Science and Training, *2004 National report*, 2002-2006, p. 108) all students must be able to demonstrate that they possess the "knowledge, skills and understanding to contribute to and benefit from reconciliation" by means of Indigenous studies programmes principally taught by non-Indigenous teachers. It is suggested that a higher proportion of students who are not Indigenous will be able to comply with the requirements of the course, even though Indigenous educators may have had a large input into the content. The reason is that found by the Victorian Equal Opportunity Board in the case of *Sinnapan v State of Victoria* (1994): regardless of the subject-matter, the culture of "mainstream" schools is based on the hierarchical model of Western society. This affects the approach to how material is taught. In that case, Northland Secondary College in Victoria had developed a unique approach which aimed:

> To treat each of the students there as individuals and to attempt to involve them in the process of receiving an education and in determining the way in which education could best be relevant to them. This method of teaching involved parents, students and teachers in the whole of the school activities and processes ... [The teachers] were to a large extent committed to a different approach to education than the approach adopted in the majority of schools throughout the State (*Sinnapan v State of Victoria*, 1994, pp. 77, 112).

Northland College had implemented its own model of education from 1976. After it engaged two Indigenous educators in the mid-1980s the study of Aboriginal culture and philosophy became integral to the "whole school approach" offered to all students, Indigenous and non-Indigenous. Because of this, the College attracted Indigenous students and by 1992 about 15% of the 400 students were Indigenous, a much higher proportion than their 0.4% representation in the Victorian population at that time (Australian Bureau of Statistics, 1996).

In the early 1990s a Victorian government task force looking into economy and efficiency recommended the closure of state schools where there were low enrolment numbers, the running cost of the school per capita was higher than the state average, and the buildings were in poor condition. The assumption which underpinned this policy decision was that all students could easily attend another Victorian state school because all schools were of a similar standard and offered similar curricula. One of the schools selected to be closed in 1992 was Northland Secondary College.

Two Indigenous students, Muthama Sinnapan and Bruce Foley, lodged a complaint of indirect discrimination with the Victorian State Commissioner for Equal Opportunity. The complaint was made on behalf of all Indigenous students at Northland Secondary College. The students argued that as a result of the closure there would be a condition imposed that if students wanted to access public education, they had to attend other schools which did not offer the "whole school approach". A higher proportion of non-Indigenous students would be able to adapt because the mainstream schools were compatible with their cultural backgrounds. Given the background of history of disadvantage, including the findings by the Royal Commission into Aboriginal Deaths in Custody that Australian schooling had failed to reflect Aboriginal values and learning styles, the demand was unreasonable in the circumstances.

After hearing extensive evidence, the Equal Opportunity Board found that the hierarchical nature of "Western" education offered in Victorian schools was incompatible with the home culture of many Indigenous students. The mismatch of cultures produced feelings of alienation which were expressed by the students in a variety of ways, for example, by dropping out, poor attendance or underachieving. At Northland however:

> The "whole school approach" of education where the teachers operated on a different authority and discipline system to many mainstream education institutions was one which lent itself to the Aboriginal culture and found acceptance in that culture ... The approach was one which appealed to students who may have been rejected from

other schools as difficult or lost causes (*Sinnapan v State of Victoria*, 1994, pp. 77, 112).

After 13 court and tribunal hearings at each of which the Victorian Government strongly resisted the claim, the students were finally successful in proving indirect discrimination and the school was reopened in 1995. In 2001 it was named one of the top 40 schools in Australia by *The Australian* newspaper. In 2003, 83 of the 89 Year 12 leavers who sought tertiary education places were successful. In 2004 it was designated a Leading School by the Victorian Department of Education and Training for its innovation and leadership in the area of technology (Northland Secondary College, 2005).

Given the unconscious yet omnipresent influence of Western culture in education it is suggested that in schools where the content of Indigenous studies is presented merely as another item on the curriculum, this may be having an adverse effect on Indigenous students. For example, they may experience distress when what the teacher is telling them is in conflict with what they have learnt at home; or that non-Indigenous teachers are professing to represent Indigenous knowledge without Indigenous peoples' agreement and permission; or that their culture is portrayed as an add-on to the curriculum rather than an integral part of life and learning and the life-blood of identity.

Being able to comply with the class's requirements to appreciate and understand history, cultures, and identity does not mean just physical ability to comply; of course the students can come along and take notes. It includes not being able to comply because of a person's cultural beliefs or protocols (*Mandla v Dowell Lee*, 1983) or by reason of their cultural imperatives (*State Housing Commission v Martin*, 1999).

In their Preface to *Improving the educational experiences of Aboriginal children and young people* Jill Milroy and Helen Milroy identified a particular adverse effect experienced by Indigenous students:

> A critical problem in educating non-Indigenous Australians ... has been the disproportionate contribution Aboriginal people, particularly students, are expected to make to the education process. Aboriginal students in schools and universities are often expected to "teach" the rest of the class about Aboriginal culture or issues, to take too great a responsibility for other students', and often the teacher's or lecturer's, learning. Aboriginal students in university report being asked to comment on any Aboriginal issue in the media, to identify racism or inappropriate remarks made by other students when teachers fail to do so, to challenge misinformation presented by lecturers. Aboriginal students also often have their own identity questioned. All of this places an enormous burden on Aboriginal students at all levels of education (Western Australian Aboriginal Child Health Survey, 2006, p. xxi).

The legislation asks whether the condition or requirement is reasonable. The lessons, designed by Indigenous educators, are often delivered by non-Indigenous teachers. The teachers may have the best of motives, but good motivation is irrelevant in anti-discrimination law. Moreover, as Milroy and Milroy point out, the real issues, the hidden messages of systemic racism which permeate the whole curriculum, are overlooked:

> Aboriginal studies, done badly can be a greater problem for Aboriginal students than not having it at all. The key issue is not just about the incorporation of Aboriginal studies curricula, but the effect of the Australian education system as a whole. This involves interrogating and correcting the negative impact of hidden messages in the broader curriculum (Western Australian Aboriginal Child Health Survey, 2006, p. xx).

It may be concluded therefore that the demands of Indigenous studies as it is presently taught in a number of schools, far from creating social justice, may in fact be adversely impacting on Indigenous students.

2. The negative impact of Standard English in the classroom

According to Downey and Hart (2005) there is an assumption in teacher training that present awareness of past racist educational practices means that racism can be avoided in the future by treating everyone the same. They argue that this erroneous view derives from teacher training which confines its discussion to individual cases of overt and easily identifiable conduct based on racial prejudice, and that it does not confront ingrained racism. I agree. Even if they were aware of it, many non-Indigenous educators have little incentive, interest or inclination to discuss Indigenous experiences of systemic racism. Therefore they are unlikely to interrogate the power of their own dominant culture to choose the school curricula and to construct the means by which it is propagated.

One of the most common ways of demonstrating that a student is participating in education is by assessing how well the student can communicate what they have learnt to the teacher. There are any number of unstated criteria used in assessing oral communication skills which are likely to have an adverse effect on students who are not from the dominant culture. For example, a student's ability may be judged on how well he or she can defend their intellectual position in debate with the teacher; however disagreeing with or challenging someone in authority may be considered disrespectful in some

Indigenous interchanges (Eades, 1992). Maintaining eye contact with the listener is another example of what is considered to be a good communication skill; yet in some cultures this is considered threatening, offensive or rude. In this section I interrogate the assumption that if a student does not speak with an accent then their home language must be Standard English and therefore their oral English communication skills can be used as a measure of how well they are participating in education.

If the use of Aboriginal English in the classroom is a special measure designed to assist Indigenous students to access their right to education, then the aim of teaching everyone in Standard English must be to provide all students with access to a language which is one of the major world languages of commerce, research and higher education. Noel Pearson (2007) advances a further benefit for Indigenous students: achieving full literacy in English will provide them with the skills by which they can become literate in their traditional languages.

Underlying the use of Standard English in schools is an assumption that Australia is officially an English-speaking country, and that apart from some immigrant and refugee students and a few students in remote Indigenous communities, it is the mother tongue of all students. However, for many urban and rural Indigenous students Standard English might be their second or third language after Aboriginal English or an Aboriginal language.

Linguists such as Eades (1992) and Zeegers, Muir and Lin (2003) note that there is a range of differences between Standard English and the English spoken by many Indigenous people. These may extend from what might be termed a dialect because of different vocabulary or pronunciation, to a totally distinct language with significant aspects of its grammar retained from the original mother languages. However the range and breadth of forms of Aboriginal English have not been widely recognised by educators and its speakers are often characterised as having poor verbal English skills.

The requirement imposed is that students be fluent in Standard English in order to be seen as successfully participating in education. A higher proportion of non-Indigenous Australian-born students are likely to find this presents no problem. For many Indigenous students however it is very difficult to be fluent in a second language especially where they have not been exposed to Standard English in their formative years, and English is not usually formally taught as a language at school, but has to be picked up in the classroom or playground. As Pearson (2007) recognises, learning English late in primary school means that the children will be compromised in what is the primary purpose of Australian schools, a mainstream, Western education. He argues that learning English is reasonable in the circumstances but to achieve fluency in both (Standard) English and traditional languages children must have access to both from the start of their education, otherwise they will "remain far behind in the language required for them to obtain a mainstream education" (Pearson, 2007).

It can be claimed, as did the Queensland Department of Education in *Hurst v State of Queensland* (2006, discussed below), that English is the language students need to use to develop their learning. Moreover it is what most educators and trainers speak; and, in any case, it is difficult to get teachers who are speakers of other languages. But does its use as a tool by which to judge participation in education make it reasonable in the circumstances?

Educational authorities would probably contend that Indigenous students appear to be able to cope with the requirement. This was the reasoning advanced by Education Queensland in *Hurst v State of Queensland* (2006). Tiahna Hurst, a profoundly deaf student, made a complaint of indirect discrimination arguing that the educational body had imposed a term that in order to get an education in a Queensland state school a student must be taught in English, including signed English. Tiahna, and other students with a similar impairment, had learnt Auslan as a first language. Invented in Australia, Auslan is the main language of the hearing impaired in this country. It is not based on English: it is a sign language with its own linguistic structure and form. Education Queensland however refused to offer Auslan as a means of instruction as it had a policy of teaching and learning through "Total Communication", which was signed and spoken English.

Tiahna argued she could not comply with the requirement of learning in English as she had learnt Auslan as her mother language from early childhood. Education Queensland responded that she was coping in school, though it was clear from evidence that she was not working to her full abilities and that she would become more and more seriously disadvantaged in her education by this requirement. Three judges of the Federal Court, in a joint judgment, held that just because a student can "cope" does not necessarily mean they are "able to comply" within the terms of the indirect discrimination legislation. Their Honours held that 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*, 2006, [125]).

The judges noted that a child could not meaningfully participate in classroom education if he or she was confused or frustrated by the imposed requirement. This judgment, which establishes the law across Australia in relation to interpreting the federal anti-discrimination legislation, clearly has implications for educational policies that might adversely affect Indigenous students. Assessing classroom participation in Standard English, without recognition of skills in a child's mother tongue, might be one of those hidden

practices which could be challenged on the grounds that it can seriously disadvantage a student who does not have Standard English as their first language.

3. Demonstrating social justice at school: Learning Australian values

Another of the hidden messages in Australian education is that the power to choose what is taught is, by and large, made by policy-makers with very similar cultural backgrounds. Thus what constitutes social justice is drawn from their own judgment of what is correct behaviour. In 2005 the Federal Government, led by the Prime Minister, demanded that certain "Australian values" be taught in Australian schools. It allotted $30 million to this endeavour (ABC Radio National, 2005). The assumption behind this initiative was that these values are accepted across the nation as being of universal application, and they are what the "typical" Australian should exhibit. Nevertheless in reality they reflect the particular background, schooling, interests, age, and experience of the ministers who support the programme.

Nine values were chosen as the most "common": care and compassion, doing your best, a fair go, freedom, honesty and trustworthiness, integrity, respect, responsibility, understanding, tolerance, and inclusion (Department of Education, Science and Training, 2005b). A "fair go" is the one most commonly cited as particularly Australian, setting the "true blue Aussie" apart from other nations, and in this list it would appear to come the closest to the values of equality and equity, which are significantly missing. However I have chosen to examine respect because respect – for culture, for difference, and for recognition of pre-existing rights to territory – seems to be particularly prized by Indigenous peoples. Respect appears as a key element not only in the *United Nations Declaration on the Rights of Indigenous Peoples* (United Nations Human Rights Council, 2006), drafted over more than 15 years by Indigenous peoples from around the world, but it also emerges from consultation with Australian Indigenous communities as being of prime importance in establishing a nation of social justice, as seen for example in the conclusions drawn by the Human Rights and Equal Opportunity Commission from its wide-ranging national community consultations undertaken in 2001 (Human Rights and Equal Opportunity Commission, 2001). Respect is also identified in government education policy documents as one of its social justice goals, for example, "The Department of Education and the Arts [Queensland] is committed to ... respect—treating all people with respect and dignity" (Queensland Government, Department of Education and the Arts, 2005, cover page).

Respect is defined by the Australian government as the value shown when we "treat others with consideration and regard, respect another person's point of view" (Department of Education, Science and Training, 2005). In my view, respect must be learned in context, usually by example. Does the daily life of school show consideration and regard for all students, their cultural beliefs, their rights to land? Students are told for example that inclusive practices which acknowledge diversity will be part of their education (Ministerial Council on Education, Employment, Training and Youth Affairs, 1999). Nevertheless students experience a curriculum more familiar to the majority than to many Indigenous students. For example, there is little discussion of the basic values of Indigenous knowledge systems and ways of learning. Indigenous students might also observe that educational authorities pay little respect to their capabilities: in his 2004 report to the Queensland government, Dr Chris Sarra stingingly observed that there was a clear and unjust disparity in treatment when an education system congratulates itself on the success of its objectives in relation to non-Indigenous students, but accepts as normal that large numbers of Indigenous students fail to receive a quality education (Queensland Ministerial Advisory Committee for Educational Renewal, 2004). Respect for their capabilities is also undermined by the fact that Indigenous students are placed in special classes at a much higher rate than non-Indigenous students (de Plevitz, 2006b). In social studies lessons respect is not accorded to Indigenous peoples as the first nations in colonised countries, nor to the valuable contribution of their land to Australia's and other countries' historical and current wealth. Even the expressed aim of bringing Indigenous students up to "equal" with non-Indigenous students (Ministerial Council on Education, Employment, Training and Youth Affairs, 1999) is disrespectful in that it implies that as a group Indigenous students are below standard. In legal terms a higher proportion of students who are familiar with the Western cultural model will be able to accept that respect is a value observed and endorsed in schools.

Is teaching respect by example based solely on the dominant values reasonable in the circumstances? Dr William Jonas has written:

> For Indigenous peoples to participate in Australian society as equals requires that we be able to live our lives free from assumptions by others about what is best for us. It requires recognition of our values, culture and traditions so that they can co-exist with those of mainstream society. It requires respecting our difference and celebrating it within the diversity of the nation (Human Rights and Equal Opportunity Commission, 2004).

Respect for difference rather than imposing "common" values is a more reasonable requirement in a society which professes to value tolerance and inclusion.

Conclusion

A socially just education is recognised in international human rights treaties such as the International Convention on the Elimination of all forms of Racial Discrimination, (United Nations, 1966) as a universal right, not a privilege. However the analysis above suggests that in Australia that right may be limited to students who can enjoy an education tailored to the mainstream student. This paper has argued that Indigenous students' enjoyment of their educational rights may be impaired by systemic racism in the very programmes meant to provide social justice. Asking the questions, would a higher proportion of mainstream students be able to comply with this requirement compared to other groups, and is the requirement justifiable in the circumstances, may give non-Indigenous educators a better understanding of why some of their teaching practices may not be providing an equal opportunity to access educational services, enjoy equity of participation, and achieve equitable and appropriate outcomes. Applying an analysis drawn from the indirect discrimination provisions has the advantage of enlarging the public's perception of discrimination beyond the paradigm of less favourable treatment because it can uncover the underlying assumptions upon which educational authorities are making policy decisions. Further, it may also provide a tool to help parents define the gaps between the governmental approach of proof of social justice by quantification and Indigenous aspirations for their youngsters.

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