

# Administrative negligence in educating indigenous children

Australia ratified the United Nations Convention on the Rights of the Child (CROC) on 17 December 1990, and has made it clear in various forums that it has a strong desire to protect and nurture the rights of children.<sup>1</sup> However, there is still a large discrepancy in terms of positive outcomes for indigenous children. The purpose of this paper is to suggest that administrative negligence may be an avenue for addressing problems faced by indigenous children within the education system.

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## THE CONVENTION ON THE RIGHTS OF THE CHILD (CROC)

Article 1 clearly states that children's rights are to be protected from all forms of discrimination, and respected irrespective of the child's parental connection. Article 30 provides the most specific statement regarding Aboriginal children.

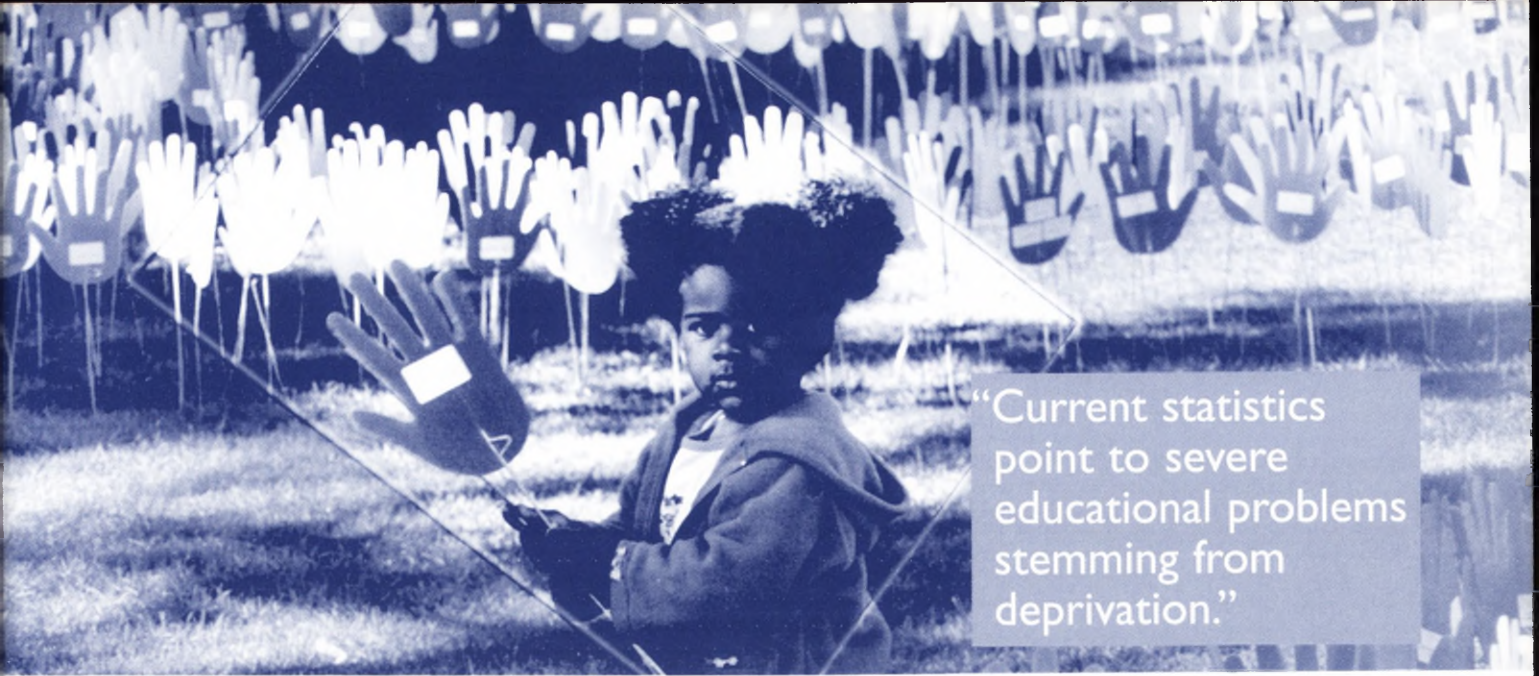
'In those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.'

Australia is a signatory to CROC and is accordingly obliged to protect the rights of indigenous minorities, while establishing structures that allow them to successfully 'enjoy', 'profess and practice' their own culture, that is practice self-determination. However, Australia's application of its responsibilities is inadequate in several ways.

'The experience of many indigenous people is of an educational system which has resulted in unsatisfactory educational achievement for their children and failed to



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“Current statistics point to severe educational problems stemming from deprivation.”

provide the educational outcomes which they desire and expect... An instance of this systemic failure is the high non-attendance rates of indigenous students... Another is the over-representation nationally of indigenous students in data concerning school suspensions... The cause of truancy and consequential behaviour in the school is attributed to individual failure and family malfunction and it is thus disconnected from the social relations and political processes which shape the experience of schooling for the marginalised group and places it outside of their experience.<sup>2</sup>

Added to this is the fact that most Aboriginal students do not come from well-adjusted home environments and this adversely impacts on the health and well-being of indigenous children.

Several questions are raised: How does this breakdown arise? Is it based on the trauma of dispossession? Or is it a consequence of 200 years of racial discrimination and a loss of agency and autonomy?

There is a clear connection between the home environment, the school environment and the real world environment. Aboriginal children do not live in a predominately middle-class home environment. In fact, most indigenous people are below the national average in terms of income and other social indicators.<sup>3</sup> It is, therefore, not difficult to attribute a poor home environment to the disadvantage an Aboriginal student suffers at school. However, the education system also plays a role in the disadvantages suffered by indigenous children.

### EDUCATION: LAW AND POLICY ISSUES

The federal government drafted a policy in which the foreword boldly asserts: ‘Aboriginal and Torres Strait Islander education has been identified as a national priority and the Commonwealth government has introduced a range of reforms and funding initiatives to improve educational outcomes of indigenous students.’<sup>4</sup>

The policy goes on to outline procedures to redress the perceived indigenous education problem. Similar policies have been produced and enacted by state and territory govern-

ments. For example, the Queensland government has said:

‘The Indigenous Education and Training Alliance (IETA) will focus on developing, trialling and implementing key aspects of the Partners of Success strategy, providing the best possible support to schools seeking continuous improvement in educational outcomes for Aboriginal and Torres Strait Islander students. IETA aims to harness the energy of schools and of other agencies to the mutual benefit of school and their communities.’<sup>5</sup>

Add to this Atherton State High School’s indigenous partnership agreement.

- Actively support enhanced learning outcomes for Aboriginal and Torres Strait Islander students;
- Develop and deliver learning strategies to enhance the understanding of Aboriginal societies.<sup>6</sup>

These are all outstanding policy statements, which would impress anyone who doubted the ability of respective governments to provide education to indigenous people. But there is more to it than that. Policy requires implementation. Yet current statistics, as noted above, point to severe educational problems stemming from deprivation within the educational system.

### ABORIGINAL CHILDREN ATTRITION RATES

A close examination of the legislative mechanisms designed to regulate behaviour in schools reveals some of the causes of high attrition rates among indigenous children. The *Queensland Education (General Provisions) Act 1989* is a regulatory act. Section 28 provides several grounds for student suspension, including ‘disobedience’, ‘misconduct’ and ‘other conduct of the student that is prejudicial to the good order and management of the state educational institution or state educational institutions’. The proceeding sections of the Act – section 29, 30, 31 and 32 - collectively outline procedural rules for suspending students.

Division 3 – Exclusion of students, outlines the process for excluding students, including mechanisms of appeal. Pursuant to section 33, grounds are set out for ‘excluding’ ▶

students. These grounds are similar to section 28, but have an added clause: 'The student's disobedience, misconduct or other conduct is so serious that suspension of the student is inadequate to deal with the behaviour.'

These legislative mechanisms are in place to ensure 'good order' prevails within educational institutions. The Act, pursuant to section 27, also establishes a duty for principals to implement a 'behaviour management plan' for their respective schools.

There are several issues to address here. While many forms of bad behaviour certainly warrant suspension or exclusion, it is important to consider whether or not a student's conduct could stem from adverse external or internal factors.

External factors include the child's home environment, which may involve physical or psychological abuse. These factors would affect Aboriginal children in rural and urban areas, and symptoms could include loss of self-esteem and abuse of drugs, such as alcohol, hard drugs or petrol sniffing.

Internal factors are associated with the systemic racism Aboriginal people feel they are constantly subjected to. This could manifest itself through teacher behaviour, which directly impedes the student's progress through the education system.

Internal and external factors together play a major role in hindering the ability of Aboriginal children to participate in the schooling system as 'normal' students. Is it reasonable for a teacher to exclude a student from the pedagogical process or environment, based on prejudice or bias attributable to the student's external or internal factors?

Here, exclusion could mean refusal to support the student's academic requirements because of a belief that they will never achieve academically, or failure to consider the basic needs of curricula development for Aboriginal students.

### ADMINISTRATIVE MALPRACTICE

Teachers, as public officers, have a duty to provide education to all students; a duty, which is arguably enforceable at law. An administrative malpractice principle has been judicially examined in a number of cases. Most notably, it was stated in *Northern Territory v Mengel*<sup>1</sup> that:

'There may be circumstances, perhaps very many circumstances, where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power.'

What foreseeable harm could a student suffer at the hands of an officer of an educational institution? The harm could be future economic loss when, for example, a teacher prevents a student from achieving a year ten or year twelve certificate of attainment, thereby hindering the student's ability to secure a place in university or TAFE.

This could happen if a student is suspended or expelled from school on numerous occasions. This may lead to a sense of isolation and resentment, and for an Aboriginal child it could simply reinforce an existing belief that the 'system' - the 'white' world - is against them.

Substantively, the teacher's behaviour may manifest itself

in a variety of ways leading to the student's expulsion or suspension. For example, it might be argued that the teacher targeted the student by continually picking on him or her, or by refusing to offer support.

If a teacher abused their office by hindering, or deliberately setting out to hinder, the performance of a student, it seems arguable under the administrative malpractice principle that their actions could be regarded negligent or, at the very least, an 'abuse of power', as for *Mengel*.

The damages suffered would be based on what the student, in all reasonable circumstances, would have achieved if they had progressed successfully through the education system. Lasting psychological effects could also be assessed.

Clearly, there are cases where students believe they were not given a fair go and were targeted by their teachers on the basis of race or some other attribute. In some instances, these students will come from unsupportive family environments, yet they will suffer as a result.

Federal, state and territory governments have collectively developed an education policy which attempts to deal with these issues. Educational institutions have also developed policy guidelines and many market themselves on their ability to provide community-relevant education. This means they have a duty to do so.

If a student is working hard to achieve in the education system, but is unable to do so because a teacher fails to provide adequate support, it seems appropriate that the student take action against both the teacher and the educational institution for administrative malpractice. If Aboriginal children are to succeed in life their citizenry rights need protection. Factors contributing to a student's 'failure' could be caused by teacher malpractice. ■

### Endnotes:

- <sup>1</sup> Discussed in P Alston and G Brennan (1991) *The UN Children's Convention and Australia*, p 2.
- <sup>2</sup> J Herbert, L Anderson, D Price, C Stehens (1998) *If They Learn Us Right: A Study of the Factors Affecting the Attendance, Suspension and Exclusion of Aboriginal Students' in Secondary Schools*, p 2-3. Contrast Carrington who argues that within the historical and constitutionalised aspect of Aboriginal schooling 'truancy would appear to be a legitimate response to the forms of institutional racism experiences at school' p 3.
- <sup>3</sup> *Australian Social Trends* 1994, 1996, 2000, 2002, Australian Bureau of Statistics.
- <sup>4</sup> *Indigenous Education Strategic Initiatives Program Supplementary Recurrent Assistance (IESIP-SRA) - A Guide for Schools*, p 3.
- <sup>5</sup> 'Indigenous Education and Training Alliance' Queensland Department of Education, p 1.
- <sup>6</sup> <http://www.athertonshs.qld.edu.au/aboutath/about.html>.
- <sup>7</sup> (1995) 185 CLR 307. *Mengel and Beaudesert Shire Council v Smith* (1966) 120 CLR 145 are High Court considerations discussed in A Robertson 'Liability of Public Officers' (2002) 34 *Australian Institute of Administrative Law Inc.*