Chapter 7:

Rights and Realities in Australian and New Zealand Education: 'regular and systematic and not unsuitable'?

Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development.[1]

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Abstract

Education: the key to life's expectations and a nation's future. The right to an education is fundamental. It is enshrined in several international conventions which have been ratified by Australia and New Zealand. The rights therein are now contained expressly or impliedly in the education legislation of most Australian states and territories, and in the New Zealand Education Acts of 1964 and 1989. This article discusses the extent of the right to education, the accompanying responsibilities, and the realities surrounding the exercise of that right in the 'free, compulsory and secular' education systems of Australia and New Zealand. Within a wide brief it endeavours to provide a snapshot of topical issues within the '4 A' components[2] *– that education is available, accessible, adaptable and acceptable for all persons.*[3]

The article invokes the words of Baragwanath J of the High Court of New Zealand who said that education was a substantive right which must be '... regular,

1 Kofi Annan, Ghanaian diplomat, seventh secretary-general of the United Nations, 2001, Nobel Peace Prize.

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2 Right to Education Primers No 3 (2001), *'Human Rights Obligations: making education available, accessible, acceptable and adaptable'*, Katerina Tomasevski, The United Nations Special Rapporteur on the Right to Education from 1998 to 2004. See also (2006) Katerina Tomasevski , *'The State of the Right to Education Worldwide Free or Fee'*, 2006 Global Report.

3 n 3.

systematic and not unsuitable'.[4] *The New Zealand Court of Appeal agreed that it was a systemic and public right. While finding, however, that as such it was not individually justiciable per se, the judges stressed that were other rights within education that were capable of legal enforcement.*[5]

Within this context the article considers the application within schools of the same human rights which exist outside – the right to natural justice, to freedom of and from religion, to safety and freedom from bullying and harassment, and to equal opportunity and freedom from discrimination. It argues that while protection of each is essential to each and every child's exercise of their right to education, there are inconsistencies and shortcomings in our education systems. The challenge is for both our governments and policy makers, and our education authorities to find more effective means of addressing these deficiencies.

Of course there are many other rights implicated within the education scenario - privacy, self-expression, and the right of minorities to their language and culture to name a few. Each is of equal importance and deserving of serious discussion within education but unfortunately beyond the confines of this article.
It is axiomatic that the protection of rights within a school community, as in society at large, requires a balance between the exercise of individual rights and the rights of all. A school environment must be safe and conducive to education, not for one at the expense of others. School authorities must tread a fine line.

Consideration of individual rights is, of course, is not the whole story. It is only through educating for rights that a rights culture is embedded over generations. The article concludes by touching briefly on the extent to which human rights education is incorporated in the curricula and in the practice of Australian and New Zealand schools. It concludes that there is an urgent need for more to be done.

Education is not the filling of a pail, but the lighting of a fire [William Butler Yeats]

I Introduction

The Government's objective, broadly expressed, is that all persons, whatever their level of ability, whether they live in town or country, have a right a citizens to a free education of the kind for which they are best suited and to the fullest extent of their powers. [The Right Hon Peter Fraser, Prime Minister of New Zealand 1940-49]

Is this a reality? The right to education in both Australia and New Zealand is expressed as being the right to a system which is 'free, compulsory and secular'. State responsibil-

4 *Daniels v Attorney-General* (3 April 2002), Unreported Judgment of the High Court of New Zealand, Auckland Registry M1516/SW99, per Baragwanath J. This case is discussed below within the context of education of children with special needs, however, the system envisaged by the judge's words is necessarily underpinned by a myriad of rights and responsibilities, powers and duties.

5 *Attorney-General v Daniels* [2003] 2 NZLR 741 (CA).

ity is discharged by establishing a system of free government education which enables all children to have equal opportunity by guaranteeing universal accessibility to education facilities. The rationale for the existence of this responsibility and the place of education as a public good was identified in New Zealand by four key points: '... social control, the need for an educated electorate, investment in economic productivity, and equal individual rights'.[6]

This article explores the exercise of this right within the education systems of both countries. It does so by considering areas of its practice in terms of the 4A's formulated by the late Katerina Tomaschevski.[7] In order for the right to be exercised, she said, there is a responsibility on the states to ensure that education is **a**vailable to all without discrimination; there is **a**ccessibility to education facilities; it is **a**cceptable to children and their parents; and it is **a**daptable in that as far as possible it meets the needs of individual students. This reflects the rights contained in a raft of international conventions, all of which have been ratified in both Australia and New Zealand, in particular, the UNESCO Convention against Discrimination in Education (Art 4), the International Covenant on Economic, Social and Cultural Rights (Art 13) and the United Nations Convention on the Rights of the Child (Arts 28 and 29). By ratification the states promise to honour the commitments therein and there is provision for regular reporting on compliance.

The scheme of the article is this:

1. The framework for the provision of 'free, compulsory and secular' education in Australia and New Zealand
2. Education within a human rights framework - the sources of human rights protections in both countries and their application to schools;
3. 'Systemic, regular and not unsuitable' – accessibility, availability, acceptability and adaptability
   - A secular education - freedom of religion and freedom from religion;
   - Bullying and harassment – threats to the exercise of the right to education in a safe environment;
   - Equal opportunity and special needs education
   - Staying in school – school discipline and disability
4. Particular current issues relating to accessibility and acceptability of education
5. Conclusion and the way forward: the progress of schools in human rights education

6 In 1877 and referred to in Coxon, I. et al (1994), *The Politics of Learning and Teaching in Aotearoa – New Zealand*, Dunmore Press, Palmerston North, p. 44. These words were referred to also in Katarina Tomasevski, *'The State of the Right to Education Worldwide: Free or Fee:* 2006 Global Report', 224.

7 n 3. The United Nations Special Rapporteur on the Right to Education of the United Nations Commission on Human Rights from 1998 to 2004.

II The Provision of Education in Australia and New Zealand – Free, Compulsory and Secular

Australia has five states and two territories.[8] While education is a function of both the Commonwealth and all jurisdictions, the states and territories have responsibility for the provision of 'free, compulsory and secular' government (public) education. Educational choice is provided for not just in public education, but through a very strong systemic Catholic and private (independent) school sector funded predominantly directly by the Commonwealth. Currently more than 1.1 million students (out of a total student population of 3.4 million) attend non-government schools in Australia and more than 90% of these students are in religious schools, mainly Catholic.[9] The Commonwealth[10] government grants the education monies to the states to run the public school system, subject to conditions[11] such as the implementation of a Safe Schools Framework, teaching national curricula and so forth. Non-public schools, including systemic Catholic and schools of other religious denomination, receive substantial funding directly from the Commonwealth government. This funding continues despite challenges on constitutional grounds (discussed below).

In December 2008, the Australian Government and state and territory Education Ministers released the *Melbourne Declaration on Educational Goals for Young Australians* (Melbourne Declaration) which set out the national purpose and policy for Aus-

tralian schooling into the future. This was followed in 2012 by a major national review of Australian schooling based on funding, the Gonski Review. This Review recommended a massive overhaul to the funding model of Australian schooling between the states and territories based on need and equity. It would have the effect of reducing the amount of Commonwealth funding to private schools, but, in line with its philosophy, it recommended that some of these schools be fully publicly funded where they serve students or communities with very high levels of need, for example, special schools, majority Indigenous schools, and remote 'sole provider' schools. Although received enthusiastically by the Australian public and its recommendations being approved by the Commonwealth Labour administration, implementation of this report has been fraught. First the Commonwealth Government had difficulties in securing the agreement of some of the states and territories to the allocation of funding, and now the new Coalition government has shown a reticence to continue supporting the funding regimes proposed.[12]

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8 New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania (the island state); the Australian Capital Territory (ACT) and the Northern Territory.

9 See Buckingham J. (2010), *'The Rise of Religious Schools'*, Policy Monograph, Centre for Independent Studies, ix.

10 For the purposes here the terms 'Federal' and 'Commonwealth' may be used interchangeably throughout.

11 Pursuant to s 91 of the Australian Constitution.

12 Gonski, D. & Ors, (2011), Review of Funding for Schooling Final Report, Australian Government, Canberra. https://docs.education.gov.au/system/files/doc/other/review-of-funding-for-schooling-final-report-dec-2011.pdf. See also http://www.abc.net.au/news/2012-08-27/whats-in-the-gonski-report/4219508.

In terms of school management and administration, each Australian state and territory has its own education act passed by the State legislature, for example the *Education Act 1990* (NSW), the *Education and Training Reform Act 2006* (Vic) and the *Schools Education Act 1990* (WA). Generally the state and territory education departments are responsible for the control of the education system within that state and they deal with all matters relating to each government school, such as budgets and the hiring and firing of staff. School principals have responsibility for the day to day management of their school and there are moves in the states towards greater school autonomy. For example, the governments of Western Australian and New South Wales[13] are currently implementing more autonomous public schools programs pursuant to the National Partnership Agreement on Empowering Local Schools initiative entered into with the Commonwealth Government in 2012. This agreement states that it will: '... contribute to greater ability of schools to make decisions at a local level, enabling them to better respond to local school community needs and provide the services designed to assist their students to achieve their best education outcomes.'

New Zealand public education has had a system of local control and autonomy of schools since 1989 when governance and management was devolved from a central Department of Education, to each school's locally elected Board of Trustees – to control and manage as it sees fit. The school Principal is the Board's chief executive in relation to that control and management.[14] The New Zealand 'free, compulsory and secular' system of education is set out in the *Education Act 1989* and comprises state schools (fully state funded), integrated schools including catholic and other denominational schools (partially state funded)[15], and independent schools which receive a small amount of state funding. In contrast to Australia, it is interesting to note that, on 14 August 2014, only 4% of New Zealand children attended these schools.[16] Within the state system also are Maori-language *Te Reo* immersion schools known as *Kohanga reo* and *Kura Kaupapa,*[17] and it is possible for children to undertake all their compulsory schooling in this way, thus exercising their right to language and culture[18] in the state system of education. Recently introduced in New Zealand is a system of Charter schools, known as 'partnership' schools or *Kura Horua.* [19] The key provisions for the setting up and management of such schools are now set out in ss158A – 158Y includ-

13 In NSW through an initiative *Local Schools, Local Decisions* (LSLD) the NSW Government is implementing educational reforms in all schools across NSW stated to be about ensuring that students are at the centre of school decision making.

14 ss 75,76 *Education Act 1989* (NZ)

15 *Private Schools (Conditional Integration) Act 1975.* However, it must also be noted that most denominational schools are integrated partially into the government system and receive a higher level of funding.

16 http://www.minedu.govt.nz/NZEducation/EducationPolicies/InternationalEducation/ForInternationalStudentsAndParents/NZEdOverview/School_Education.aspx. Retrieved 4 September 2014.

17 Provided for in s 155 *Education Act 1989.* It is of interest to note that there is also a Maori system of higher education known as *Wananga.*

18 Pursuant to s 20 *New Zealand Bill of Rights Act 1990 (NZBORA)* –Right of minorities.

19 For a full discussion of charter schools, see Geohagen, E. (2013), *'The New Zealand Model of Charter Schools: A Look at the Legislative Framework and Legal Characteristics of a Partnership School Kura Hourua'* Proceedings of the Annual Conference of the Australia and New Zealand Education Law Conference, 'Safe, Successful and Sustainable Education: Is the Law a Sword or a Shield?", Hobart, Tasmania, Australia, 1-3 October.

ing a responsibility on the "sponsor" to ensure a safe physical and emotional environment for students. It has been suggested that these schools may be set up by particular faiths and minority cultures but this is yet to be realised.

Although self-managed, all New Zealand schools must operate according to the National Education Guidelines (NEGS) and National Administration Guidelines (NAGS) which are statements of goals, policy, curriculum, codes of administration and so forth.[20] The NAGS provide among other things that schools must provide a safe physical and emotional environment for students.[21]

III Education within a Human Rights Framework

New Zealand and Australia would consider themselves to have robust rights cultures and have both ratified international conventions such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Universal Covenant on Civil and Political Rights, the Convention on the Rights of Persons with Disabilities and the United Nations Convention on the Rights of the Child (UNCROC).

New Zealand does not have a written constitution but in 1990 it enacted the *New Zealand Bill of Rights Act 1990* (*NZBORA*).[22] This Act affirms, protects and promotes human rights and fundamental freedoms, including natural justice, non-discrimination, bodily integrity, those of minorities to language and culture and so forth. The rights therein clearly apply to the actions of public schools as state actors, and it has been strongly argued that they apply to the actions of private schools also as they are performing the public function of education, albeit privately.[23] There is also the *Human Rights Act 1993* (NZ) (*HRA)* which provides protections for equal opportunity and against discrimination in all areas of private and public life. The *HRA* provides a mechanism for resolution of complaints through mediation, and is administered by

20 These are under review at the time of writing.

21 s 60A *Education Act 1989,* NAG 5 (i).

22 It must be noted however that while this Act, in common with the UK's *Human Rights Act 1990,* is not supreme law, it has been accorded significant status by the New Zealand courts –see for example, the words of Cooke J in *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 when monetary compensation was awarded for unreasonable search and seizure in breach of s 21 *NZBORA*.

23 s 3(b) *New Zealand Bill of Rights Act 1990* as they are performing a 'public function, power or duty conferred' by law. Certainly there has been strong support of its impact at least in public schools as authorities performing a public function pursuant to s 3(b) NZBORA: *RE Strip Search at Hastings Boys High School* 1 NZBORR 480 (Commissioner for Children). Despite McGechan J holding in the case of *Federated Farmers of NZ v New Zealand Post Ltd* 3 NZBORR 339 that s3(b) ensured applicability to private bodies engaged in a public function, there was doubt cast by Goddard J in relation to full applicability to public schools' actions in a boarding facility attached to the school: Goddard J in *McGuinn v Board of Trustees of Palmerston North Boys' High School and Attorney-General* (H.C, Palmerston North, 24-12-96; CP 36/95). However, at least in the context of search and seizure at school and the s21 NZBORA, the Guidelines for the Surrender and Retention of Public Property and Search January 2014, make it clear that the 2013 provisions of the *Education Act 1989*- ss 139AAA-139AAI in the case of public schools and in hostels run by those schools, are subject to the Act.

the New Zealand Human Rights Commission. The Commission performs a vital role as watchdog of adherence to human rights principles and to international instruments of which New Zealand is a signatory. Many of its reviews and reports are cited within different contexts within the passage of this article.

Australia has a written constitution,[24] enacted on Federation and primarily concerned with federal/state interaction and responsibility. It has no statement of rights, either legislative or constitutional, despite regular calls for such an instrument. One state and one territory have enacted bill of rights legislation: *Victorian Charter of Human Rights and Responsibilities Act 2006,* and the Australia Capital Territory *Human Rights Act 2004.* These instruments have legislative status only and are not supreme law (in common with the *New Zealand Bill of Rights Act 1990* and the UK *Human Rights Act 1998* and unlike the *US Constitution* and the *Canadian Charter of Rights and Freedoms).* The right to education is contained in state and territory legislation (outlined above). Other fundamental rights, for example equal opportunity and anti-discrimination, and privacy exist in Commonwealth legislation and state and territory enactments.[25] Many of the other rights implicated in education, such as natural justice and freedom of expression and bodily integrity (in terms of search and seizure) exist as being upheld at common law.

Although natural justice is rightly generally accepted to be at the core of judicial and other process in Australia, there is cause for concern in a recent decision in the New South Wales Supreme Court concerning the lack of an obligation on non-public schools to accord their students procedural fairness. While this fundamental right and the consequential public law remedy of judicial review is clearly allowable in the case of decisions made by state schools,[26] a student who had been expelled from a private school was denied such review by the New South Wales Supreme Court in *Bird v Campbelltown Anglican Schools Council.*[27] The Court held that such a public law remedy did not apply in a relationship which was fundamentally contractual, proceeding to find that the school had no public law obligation to apply principles of procedural fairness in making decisions concerning students.[28] A little comfort may be taken from the suggestion that this ruling only applies to decisions of private schools and not those within Catholic system and the latter are required to afford procedural fairness when considering suspension or expulsion.[29]

24 The Commonwealth of Australia Constitution Act.

25 For example, the *Disability Discrimination Act 1992* (Cth), the *Racial Discrimination Act 1975* (Cth), *the Equal Opportunity Act 1995* (Vic), the *Anti-Discrimination Act 1977* (NSW) and similar Acts in all states and territories. It is important to note that where there are inconsistencies, federal legislation overrides state provision.

26 *CF (by her Tutor JF) v State of New South Wales (Department of Education)* (2003) 58 NSWLR 135; see also *McMahon v Buggy* (NSWSC unreported, December 1972).

27 [2007] NSWSC1419, per Einstein J. The first proposition endorsed in the Australian Capital Territory in *Brennands v Hartung* [2012) ACTSC, 132 [53-55].

28 For a comprehensive discussion see Ford, D. (2014), '*School Discipline* ', Emil Ford Solicitors, 11 June. http://www.emilford.com.au/imagesDB/wysiwyg/SchoolDisciplinePaper2014websiteedition_1.pdf.

29 In support Ford refers to the Catholic School Office Diocese of Lismore *Suspension and Expulsion of Students Policy and Procedures* (2011), note 29 above, p vi.

V 'Systemic, Regular and not Unsuitable'

A: Secular Education - Freedom Of Religion And Freedom From Religion

In addition to their indigenous peoples, New Zealand and Australia now have diverse multi-cultural and multi-ethnic populations. Secularism, and the rights and freedoms associated with religious belief give rise to complex issues in public education. Questions arise generally in two respects – both in connection with freedom of religion, and freedom from religion.

New Zealand does not have a constitutional separation of church and state. Australia does in that its Constitution contains an anti-establishment clause, Clause 116, which provides;

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Constitutional claims have alleged a breach of this Clause. The first was a challenge to the funding provided by the Commonwealth government to religious, largely Catholic, schools. The second challenge related to the direct funding by the Commonwealth government of religious programs in public schools in all states and territories.

The first issue came to the fore in 1981 in the landmark case of *Attorney-General (Vic): Ex Rel Black v The Commonwealth (the DOGs case)*. It was argued that the funding of denominational, Catholic schools amounted to the 'establishment' of religion by the State prohibited by Clause 116. In a decision arguably based more on practicality than doctrine,[30] the High Court of Australia held that grants by the Commonwealth to assist the educational provision by non-public religious schools was not in breach of Clause 116.[31] In pointing to what he saw as the reasons behind the insertion of Clause 116 in the Constitution, Mason J referred to the population at the time which comprised large numbers of Irish Catholics, and said: [32]

> To the Australian colonists the preservation of religious equality was perhaps more important than the preservation of religious freedom for the simple reason that they had experienced the disadvantages of religious inequality and it posed a more immediate threat than the absence of religious freedom.

30 In the lead up to the action and in protest, considerable numbers of parents withdrew their children from Catholic schools and tried to enrol them in the available public schools which could not cope with the numbers.

31 Cl 116 of the Australian Constitution has been considered recently by the High Court of Australia once again as a challenge to Federal Government funding of the School Chaplaincy scheme, discussion follow.

32 (1981) 146 CLR 559, at para 15 per Mason J.

Catholic and other denominational schools continue to receive significant amounts of Commonwealth funding. Constitutional issues aside, there is undeniably a tension between secularism and the combined rights to religious freedom and to educational choice which provide strong justification for this funding. From time to time there is controversy surrounding the establishment of other faith schools both within and outside the public school system. In 2009, much media attention was paid to a local council's failure to grant permission to the Quranic Society to establish an Islamic school. Much of the objection, as reported, was born out of suspicion and post 9/11 fear of extremism, rather than objection on religious or public funding grounds. Such instances, arguably borne out of media hype and ignorance, may only increase in light of the threats of terrorism posed for Australian society as elsewhere.[33]

The second constitutional challenge arose recently in connection with freedom from religion. In 2012 the High Court was asked to consider whether the Commonwealth Government's funding of the School Chaplaincy Program, introduced in 2007 in all public schools, was in breach of Clause 116.[34] In *Williams v Commonwealth of Australia*[35] the Plaintiff was a Queensland parent who objected to the program in the schools attended by his four children. In its decision the High Court[36] neatly avoided the 'religious' issue. Instead it decided the case on an alternative constitutional argument, relating to the Commonwealth government's funding powers under section 96 of the Constitution. Legislation was passed hastily by the Commonwealth Government to enable the program to continue. One year later, when the Commonwealth Government, at the same time as announcing substantial reductions in its contribution to the states to maintain their government education systems generally, stated an intention to continue to fund the Chaplaincy program, Mr Williams returned to the High Court. In June 2014 the High Court decided that the legislation passed to enable the funding was invalid, thus the funding of the program was also invalid.[37] Once again, their Honours decided on that basis rather than tackling the thorny issue of the separation of church and state, set out in Clause 116. While now discussion continues about the future of the program in various states, it seems that it is here to stay.[38] The Prime Minister Tony Abbott has announced that his government will continue to fund religious chaplains even though the states have requested commonwealth funding of secular

33 *Sydney Morning Herald, 'Cheers as Islamic School rejected'*, 28 May 2008.

34 See National School Chaplaincy and Student Welfare Program Guidelines, Australian Government July 2012, http://www.saasso.asn.au/wp-content/uploads/2013/04/National-School-Chaplaincy-and-Student-Welfare-Program-Guidelines.pdf

35 [2012] HCA 23 (20 June 2012).

36 The High Court of Australia is judicially empowered to make decisions relating to the Australian Constitution.

37 *Williams v Commonwealth of Australia* [2014] HCA 23. The funding was purported to be validated under the *Financial Framework Legislation Amendment Act (No 3) 2012 (Cth)* passed to amend the *Financial Management and Accountability Act 1997*(Cth) and the *Financial Management and Accountability Regulations 1997* (Cth).

38 http://www.abc.net.au/news/2014-08-27/chaplaincy-program-revised-after-high-court-ruling/5701390.

welfare programs instead, and associations who provide the chaplaincy program have announced that they will continue at least in New South Wales schools.[39]

There is another troubling issue which has arisen from the Chaplaincy program in schools. Homophobic teaching of some school chaplains has been alleged and there is concern at the potential risk this creates for gay students. It has been reported that Access Ministries, who supply chaplains and religious instruction to a large number of Victorian schools, distributed material to school pupils in which homosexuality is claimed to be a sin.[40] In response a Safe Schools Coalition has been launched in Victoria, and is being expanded into New South Wales and South Australia.[41]

Further questions relating to freedom from religion in teaching, and in the day to day life of schools in both Australian and New Zealand schools, continue to arise from time to time. Primarily they concern the extent to which religion may be incorporated within government schools in a secular system. In both countries, the secular nature of public education as provided for in education acts,[42] is accepted to mean non-sectarian, allowing for schools to provide general religious instruction or non-denominational education. In most education legislation, schools may also provide special religious instruction if there is demonstrated sufficient demand in the school community. Parents may request that their children 'opt' out of any religious education classes. In many states of Australia this is controversial as children in this position are not given any alternative instruction and it is perceived to be a waste of their school time and thus a deprivation of their right to education. Recent actions have also alleged unlawful discrimination, for example in *Aitken & Ors v The State of Victoria (Department of Education & Early Childhood Development) (Anti-Discrimination).*[43] A group of Victorian parents argued that the provision of special religious instruction (SRI) in the three public schools their children attended had the effect of direct and indirect discrimination under the *Equal Opportunity Acts 1995* and *2010* (Vic). The claim in respect of the Department of Education's policy was that by not participating in these classes the children are identified as different and separated from their class mates when they take place. Further they argued that they take place during school hours and there was a lack of curriculum instruction at that time provided for the students who had 'opted out'. The Tribunal dismissed all the claims. It made its decision on the facts, finding that no infringement of, or limitation of, the human rights of the complainants' children was proved under either equal opportunity legislation or the Victorian *Charter of Human Rights and Freedoms.*

39 It is of interest to note the intense media interest in this issue, which includes speculation and statements made by various states on the future of the Chaplaincy program: *'Chaplains to stay in schools after federal funds stop', 'Reading, Writing, Religion' Sydney Morning Herald* 28-29 June 2014, 7, 27; *'School Chaplains believe program will go on' Sydney Morning Herald,* 19 June 2014.

40 *"Mixed Message for gay pupils', The Sun-Herald,* 8 June 2014, 2. http://safeschoolscoalition-victoria.org.au/safe-schools-coalition-australia/

41 http://www.fya.org.au/inside-fya/initiatives/safe-schools-coalition-australia

42 For example, s 30 *Education Act 1990* (NSW), s 2.2.10 *Education and Training Act 2006* (Vic), and s 68 (1) (a) *School Education Act 1999* (WA) 'not to promote any religious practice, denomination or sect'; *Education Act 1964* (NZ)

43 [2012] VCAT 1547 (18 October 2012).

As there was no secular or curriculum instruction while SRI was being conducted, all children at the school were treated in a similar manner and the complainants' children were in no way singled out. By implication, it seems that the Tribunal ratified the policy of the Victorian Department of Education for provision of religious instruction in government schools. Other Australian courts and tribunals have taken a similar view in dismissing complaints objecting to religious observances in public schools. One example is an allegation of racial discrimination under the *Anti-Discrimination Act 1977* (NSW) by a parent of the Jewish faith. He objected to Christmas concerts, his children's participation in a nativity scene, and exchanging Easter eggs.[44]

In New South Wales, in response to similar complaints to those of the Victorian parents above, and in recognition of the large numbers of children who 'opted out' of religious education, the government introduced a trial Ethics course into government schools, to be provided as an alternative. Despite considerable controversy with the media airing the viewpoints of both sides, this provision was formalised in 2010 when the *Education Act 1990* (NSW) was amended by the insertion of section 33A, to allow for special education in ethics to be provided in government schools.

Similarly in New Zealand the right to secularism incorporates provisions for general religious education.[45] As in Australia the place of religion in schools is complex, arising in no small extent from the changed nature of New Zealand society since the drafting of the current provisions relating to religious instruction in schools in the *Education Act 1964*.[46] Government censuses now reveal a dramatic increase in New Zealanders who declare themselves to be of 'no religion'.[47] It has been said that there is a 'trend now towards new generations of secular New Zealanders questioning long standing laws and practices in education such as schools producing religious pageants'.[48] Also New Zealand society has become considerably more ethnically and culturally diverse. Nevertheless, legislation provides that public schools may have religious observance and may provide religious education as part of a broader context, rather than instruction in particular religions.[49] Boards of Trustees of schools have considerable discretion as to what they provide in terms of religious instruction or observance but this must be done within guidelines, particularly with students being able to 'opt out'[50]

44 *A obo V & A v New South Wales Department of School Education* [2000] NSWADTAP 14.

45 s 77 *Education Act 1964.*

46 It should be noted that the *Education Act 1989* is the most recent legislation but it preserves some provision from the *Education Act 1964.*

47 In the 2013 Census 48.5 percent (10,869 people) stated they had no religion, while 5.7 percent (1,287 people) objected to answering the religion question – Statistics New Zealand, http://www.stats.govt.nz/searchresults.aspx?q=religious%20profiles.

48 Varnham, S. and Evers, M. (2009), 'Secular, Singular and Self-Expression? Religious Freedom in Australian and New Zealand Education', *Irish Educational Studies,* 28(3), 292, quoting Rishworth, P. (2007), *The Religious Clauses of the New Zealand Bill of Rights.* Essay presented at the Legal Research Foundation's Conference 'The New Zealand Bill of Rights Comes of Age, 27-28 July, in Auckland, New Zealand, 3.

49 See Human Rights Commission (2009), *'Religion in New Zealand Schools: questions and concerns' Te Kahui Tika Tangata* and Victoria University of Wellington, New Zealand.

50 The principal must take all reasonable steps to ascertain the student's views on the matter - s 25A(3) *Education Act 1989.*

and in a non-discriminatory way.[51] Religious education must be in accordance with human rights protections under the *NZBORA* – to freedom of thought, conscience and religion (section13), the right to manifest religion or belief (section 15), freedom from discrimination (section 19) and the rights of minorities not to be denied the right to enjoy their culture, practice, religion or language (section 20).

In recognition of New Zealand's biculturalism with its indigenous Maori people, it is common for schools to have practices such as *karakia*[52] and *tikanga* Maori which often contain strong religious overtones.[53] This often presents a tension for schools between the strong commitment to biculturalism in New Zealand society and freedom from religion.

In primary schools religious practices may only take place when the school is closed for regular instruction, subject to the ability of students to 'opt out'.[54] Examples of problems arising in the education context generally have been demonstrated for example in in the reported outrage by some parents at Seatoun Primary School in Wellington over a lunch time 'Kidsclub' – a lunchtime Christian Club being run by some parents at the school.[55] More recently Christian education has reportedly been in the spotlight after several instances of parents laying complaints with the Human Rights Commission about bible lessons at a number of public schools.[56]

Finally, there are related issues of freedom <u>of</u> religion connected with freedom of expression and the exercise of rights and freedoms connected to religious manifestation and expression, inevitable in our new diverse societies. Complaints generally relate to dress or adornment in recognition of a particular religious and ethnic belief. In Australia, there has been media reporting of a small number of complaints to the anti-discrimination or equal opportunity tribunal of the particular state or territory. It must be noted however that invariably the matter is settled by the school or education authority before it goes any further.[57] This is particularly the case now in a society

51 ss 78 & 79.

52 A Maori incantation or prayer which acknowledges a spiritual presence.

53 There has been discussion whether Maori Christianity and spirituality generally, in the form of prayers at Maori ceremonies, should be allowed in schools, see Human Rights Commission Report (2004), *Human Rights in New Zealand Today Nga Tika Tangata O Te Motu.*

54 See New Zealand Human Rights Commission Report (2004), *Human Rights in New Zealand Today Nga Tika Tangata O Te Motu.* See *'St Heliers School finds solution to religious stand-off' New Zealand Herald,* 11 February 2014. http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11199819.

55 *'Religious Club Divides State School', New Zealand Herald,* 9 June 2005.

56 *School Bible studies challenged,* 29 January 2014. http://www.stuff.co.nz/national/education/9661863/School-Bible-studies-challenged.

57 For a comprehensive discussion of issues relating to religious freedoms and education in Australia and New Zealand, see Varnham, S. and Evers, M. (2009), 'Secular, Singular and Self-Expression? Religious Freedom in Australian and New Zealand Education', *Irish Educational Studies,* 28(3), 279.

characterised by religious and cultural diversity and, in similar vein to the UK, most schools provide uniform variations in recognition.[58]

In New Zealand the freedom of thought, conscience and religion contained in section 13 *NZBORA* extends to the right of pupils to wear items such as headscarves, kirpans, crucifixes, *taonga* and suchlike and a school is required to justify any restriction it imposes. Since 2002, the New Zealand Human Rights Commission complaints service has revolved around mediation with the result that matters would be resolved in this way there, in the rare absence of resolution at school level.

The reality of our now multi-cultural, multi-ethic and multi-religious societies calls for a revisiting of policies relating to religion in public schools, and in public life generally.

B: Bullying and harassment – threats to the exercise of the right to education in a safe environment

Bullying in schools is now recognised as a precipitating factor for truancy or lack of engagement of children in their education.[59] The effects are both short term, in preventing education in a safe atmosphere which is conducive to learning, and long term in being causative of psychiatric and emotional harm, even leading to suicide. It has been suggested that this is particularly the case with children who are 'different', indigenous children and children from immigrant and refugee families settled in Australia. Research shows it to be a factor which may lead parents to homeschool their children with disabilities.[60] Accordingly, in both Australia and New Zealand bullying is now seen as a human rights issue. Clearly, a school environment in which bullying is allowed to exist is counterproductive to the exercise of the right to education, for the 'victims', the 'bullies' and for the whole school community.

In Australia the National Safe Schools Framework is supported by all Australian Ministers and education jurisdictions, and has a stated vision that '[A]ll Australian schools are safe, supportive and respectful teaching and learning communities that promote student wellbeing'. The implementation of programs for promotion of and adherence to this vision is a condition of the Australian Government's grants for education to the states and territories, under section 96 of the Constitution. Despite this however, there is evidence that all forms of bullying, including cyberbullying, are on the rise

58 As was the case in the UK in *R (on the application of Begum (by her litigation friend, Rahman) v Headteacher and Governors of Denbigh High School (Appellants)* [2006] UKHL 15 where, although the dress code for the particular school was not appropriate for the Applicant, their Lordships were persuaded that her right to education had not been denied as she could have attended an alternative school which had the suitable uniform prescribed.

59 Australian Law Reform Commission (1997), *Seen and heard: priority for children in the legal process*, Chapter 10, ALRC Report 84, Australian Government, Canberra. http://www.alrc.gov.au/publications/report-84.

60 Home education is beyond the confines of this article but for a comprehensive discussion of home education in Australia and New Zealand see Varnham, S. (2008), 'My home, my school, my island: home education in Australia and New Zealand', *PUBLIC SPACE: The Journal of Law and Social Justice*, 2:3, 1-30, quoting T Harding, T. and Farrell, A. (2003), 'Home Schooling and Legislated Education', *Australia and New Zealand Journal of Law and Education*, 8, 128.

in schools. Strong official and public recognition of the prevalence and harmfulness of bullying was seen in publicity surrounding Coronial Inquest into the suicide of a New South Wales schoolboy Alex Wildman and the New South Wales Government Response.[61] It revealed that while all state Departments of Education had policies for schools in responding to bullying they were 'dense' and confusing and did not allow for all persons involved to 'join the dots'. The Coroner made a large number of recommendations for improvement of policies and their implementation in schools, and there is now considerable research and resources being applied to the prevention of school-related bullying. Successful implementations however remain to be seen. In recent moves, the Australian Human Rights Commission and ReachOut.com have developed factsheets for young people on how to deal with bullying, information on young people's rights, and links and numbers on where to find help.[62]

In addition to the threat posed by bullying on the ability of children to access their right to education, there is now in Australia a body of jurisprudence which recognises the potential for long-term psychiatric damage from bullying behaviour in schools which goes unaddressed. Courts in New South Wales particularly have made substantial awards of damages against the states and school authorities.[63] Beginning with the case of *Cox v New South Wales*[64], and most recently *Oyston v St Patrick's College*[65] the judges have been prepared to sheet home responsibility to schools on the basis of a breach of their duty of care owed to the student in their failure to take effective remedial action. Faced with this potential liability the most tempting course of action for schools is reactive, to exclude the perpetrators. Of course, as with all such matters, this once again requires the delicate balance between the rights of all students to an education. Proactive, restorative approaches which work towards keeping all children in schools and schools safe are to be preferred and such approaches are now receiving more attention among educators, though unfortunately in Australia at least, they have let to gain traction among education policy makers.[66]

61 New South Wales Government, (2010) *Inquiry into the Bullying of Children and Young People,* Response to the Report of the Legislative Council General Purpose Standing Committee No 2, May.

62 http://bullying.humanrights.gov.au/

63 In addition and anecdotally, many claims in respect of bullying are settled by the State and Territory Departments of Education before they proceed to litigation.

64 [2007] NSWSC 471. For a comprehensive discussion of a school's responsibility in respect of bullying, see Campbell, M., Butler, D. and Kift, S. (2008), 'A School's Duty to Provide a Safe Learning Environment: Does this Include Cyberbullying?' *Australia and New Zealand Journal of Law and Education,* 13(2), 21.

65 (2013) NSWCA 310.

66 See Varnham, S. and Jackson, J. (2007), *Law for Educators: School and University Law in Australia,* LexisNexis, Australia, Chapter 10 'School Discipline and Restorative Practices',153; also Varnham , S., Evers, M. and Booth, T. (2011), 'Let's Ask the Kids – Practising citizenship and democracy in Australian Schools', *International Journal of Law & Education,* 16 (2), 75.

New Zealand faces similar problems with corresponding concern.[67] In 2009, in response to the high incidence of bullying, and complaints to the Human Rights Commission from children and parents alleging failures of schools to take effective action, the Commission conducted a Human Rights Analysis on the basis that a failure to ensure safety in schools implicated a number of human rights issues surrounding the fundamental right to education. The approach of the inquiry involved several elements based on the relevant international rights treaties to which New Zealand is a party and the *New Zealand Bill of Rights Act 1990*. Of fundamental importance was the linking of the right to participate with the reality of participation of all members of the whole school community in such processes, and the need for a balance in conflicting rights. It aimed to prioritise the most vulnerable members of the school community, empowering them to use their rights as a leverage to legitimize their voice in decision making, and ensuring non-discrimination and equal opportunity within the school environment.[68] It made a number of recommendations for guidelines and protocols, emphasising particularly the right to participation of all the school community and restorative practice in the context of the impact of such behaviours on the right to education and the right to personal security. It aimed to develop 'fair, transparent and lasting solutions'. It seems however that progress is slow, as the results of a recent study indicate. In this first comprehensive survey of both teachers and senior managers (1,236 completed part, and 860 completed all), while eighty-three per cent believed the whole school community should be involved in anti-bullying strategies,[69]it seemed that very few of these available were actually being implemented.[70]

It is a sad fact that bullying in schools is often directed at vulnerable children, particularly those with special needs. This article now considers equal educational opportunity of these children.

C: Equal Opportunity and Education for Children with Special Needs

As signatories to the International Convention on the Rights of Persons with Disabilities both Australia and New Zealand have education systems which are built around the principle of '[F]ull and effective participation and inclusion in society' in Article 3(c), and specifically the philosophy of inclusion in education as set out in Article 24 of that Convention. This is also in keeping with state obligations under Article 23.1 of the United National Convention on the Rights of the Child.

67 In fact, a report by the Office of the Children's Commissioner quoted an international study in 2007 that rated New Zealand Schools among the worst in the world for bullying with rates more than 50% above the international average: Carroll-Lind, J. (2009), 'School Safety: An Inquiry into the Safety of Students at School', Office of the Children's Rights Commissioner, Wellington, New Zealand.

68 New Zealand Human Rights Commission (2009), *School violence, bullying and abuse: A Human Rights Analysis,* March.

69 Green, V. A., Harcourt, S., Mattioni, L. and Prior, T. (2013), '*Bullying in New Zealand Schools: A Final Report* ', Victoria University of Wellington, 11.

70 n 70. The Report pointed to at least two specific anti-bullying programs designed for use in schools: The Peace Foundation, *Te Tuapapa Rongomau o Aotearoa* (2012), *Cool Schools Mediation Programme,* http://www.peace.net.nz/index.php?pageID=38; and New Zealand Police *Kia Kaha Youth Education Programme* http://www.police.govt.nz/kia-kaha .

In Zealand equal opportunity in education through a policy of 'mainstreaming' is provided for in section 8(1) of the *Education Act 1989*:

> Except as provided in this Part, people who have special educational needs (whether because of disability or otherwise) have the same rights to enrol and receive education at State schools as people who do not...

In 2000 the then Minister of Education introduced a government scheme known as Special Education 2000 (SE2000), which aimed at abolishing most special schools and facilities. They were to be replaced by the provision of funding to all schools within a prescribed resourcing system to accommodate children according to their disabilities. In *Daniels v the Attorney-General*[71] a group of parents of children with special needs challenged this scheme. They contended that the policy amounted to a breach of their children's right to education, which, they argued, was best fulfilled in special education facilities. Baragwanath J of the High Court agreed, making the statement (used in this article) that education for all children should be 'regular, systemic and not unsuitable'. The Court of Appeal, while adopting this view in principle, overturned the decision that the Minister's policy could be challenged by individuals. The judges held that the right to education as provided in the Act was a public statutory right to be educated in a system which was designed to ensure regularity and quality, and to which there was universal access. This, they said, was provided by SE2000. It followed that it was not a right which was enforceable by individual students. The judges did accept however that there were certain rights of children which could be enforced within the education context. These were rights for example of due process in the school exclusion process, and equal opportunity rights.[72]

Discrimination on the basis of disability is unlawful as a breach of section 21(1) (h) of the *Human Rights Act 1993 (HRA)*. These provisions are also incorporated within the *NZBORA* (section 19).[73] Within the *HRA* 'disability' is widely defined. It includes physical disability or impairment, physical or psychiatric illness, intellectual or psychological disability or impairment: any other loss or abnormality of psychological, physiological, or anatomical structure or function, reliance on a guide dog, wheelchair, or other remedial means, or the presence in the body of organisms capable of causing illness. Sections 57 to 60 apply to the actions of educational establishments:
Primarily section 57:

(1) It shall be unlawful for an educational establishment, or the authority responsible for the control of an educational establishment, or any person concerned in the management of an educational establishment or in teaching at an educational establishment,—

71 *Daniels v Attorney-General* (3 April 2002), Unreported Judgment of the High Court of New Zealand, Auckland Registry M1516/SW99, per Baragwanath J. See also n 5.

72 *Attorney-General v Daniels* [2003] 2 NZLR 741 (CA). For a comprehensive discussion of this decision, see Ryan, E.J. (2004), 'Failing the system? Enforcing the right to education in New Zealand', *Victoria University of Wellington Law Review (VUWLR)*, 45, 735; and Varnham, S. (2005), '*Daniels v The Attorney-General:* Children with Special Needs and the Right To Education in New Zealand', *International Journal of Education Law and Policy*, 1 (2), 236.

73 Pursuant to s 145 *HRA*.

(a) to refuse or fail to admit a person as a pupil or student; or
(b) to admit a person as a pupil or a student on less favourable terms and conditions than would otherwise be made available; or
(c) to deny or restrict access to any benefits or services provided by the establishment; or
(d) to exclude a person as a pupil or a student or subject him or her to any other detriment,— by reason of any of the prohibited grounds of discrimination.

There are exceptions provided for positive discrimination (section 58) and where the person's disability is such that in order for them to take part in or derive benefit from an educational programme that person requires special services or facilities that in the circumstances cannot reasonably be made, or where the person's disability is such that there would be a risk of harm to that person or to others and it is not reasonable to take that risk (section 60). However it is clear that this exception does not apply if the person in charge 'could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level'.

It would be unusual in New Zealand for a complainant to seek recourse to the courts, but rather complaint is commonly made to the Human Rights Commission (HRC). The HRC reported that in 2008/09 it 'received two major complaints from national disability organisations which cited systemic discrimination against disabled students within education policies and practices' and that '[T]he breadth and details of these complaints ... highlighted the barriers that disabled children and young people and their families face'[74] in exercising their right to education. It stated that since 2002 over half the complaints and enquiries it received in this area related to four general themes: problems surrounding the enrolment of children in school, the exclusion from school because of their disability or for behaviour caused by the disability, funding of support and assistance, and a disabled child's ability to participate in wider school activities, such as school camps. It concluded that there are significant outstanding issues relating to all four of the 'A' components: accessibility - participation rates are disproportionately low; availability – an insufficient number of people are trained as special needs educators; acceptability – education standards vary for students with a disability as to those without; and adaptability – provision does not reasonably accommodate the needs for the education of children with special needs. It noted that the International Convention on the Rights of Persons with Disabilities acknowledged the complexities of inclusive education, and the need to provide effective individual support to maximise development, 'by focusing on educational outcomes, rather than the educational setting alone'.[75]

Similar shortcomings had earlier been set out by the HRC in its 2004 report *Human Rights in New Zealand Today Nga Tika Tangata o te motu* and its *2005-2010 Action Plan for Human Rights: Mana ki te Tangata.* These reports raised major national concern about barriers to the right to education of children with disabilities, which led the

74 New Zealand Human Rights Commission *te Kahui Tika Tangata* (2009), *Disabled Children's Right To Education,* Wellington, New Zealand.
75 New Zealand Human Rights Commission *te Kahui Tika Tangata* (2009), *Disabled Children's Right To Education,* Wellington, New Zealand, 19.

Government set up A *Review of Special Education 2010* (the Review). It aimed at conducting a wide examination of the lack of services in terms of nature and extent provided since the inception of Special Education 2000, as were envisaged by the judges in *Daniels v Attorney-General.* It gathered wide opinion from across the sector, including parents and *whānau*,[76] '... to identify the need for:

- Increasing inclusive practices in schools
- Raising achievement for learners with special education needs/disabilities
- Reducing bureaucracy and making special education services (provided by the Ministry and schools) easier for parents and *whānau* to access and navigate.'

It was heralded as representing a turning point in special education. However there remain special needs facilities in regular schools[77]and in April 2012 it was reported that there were still 2,400 learners attending 28 special day schools around the country.[78] The New Zealand Government continues to pursue a vision of a fully inclusive education with a shift in perspective from categorising those with special educational needs to 'a more nuanced perspective' where learners are on continuum according to a range of needs and resources and supports are allocated to advising schools on how they can more effectively accommodate learners with special needs into all aspects of school life.[79]

In Australia, in common with New Zealand, education policy, legislation and practices are based expressly or impliedly on a philosophy of inclusion rather than separation. While state and territory legislation generally provides for special schools or education facilities, mainstream education is preferred. The federal system means not only that there is both commonwealth and state provision for education of children with special needs, but also anti- discrimination and equal opportunity legislation in respect of disability varies from Commonwealth legislation and from state to state.

The Australian approach is to place positive mandatory obligations on all education providers through the Commonwealth Disability Standards for Education ("the Standards") 2005. Before these Standards were introduced there had been several high profile cases taken under the *Disability Discrimination Act 1992* (Cth) (DDA) which clearly illustrated the reluctance of schools to provide the same educational opportunities to children with disabilities. There were particular problems in that schools were reluctant to enrol children with physical disabilities. This was largely; it has been suggested, due to a fear of the unknown rather than any solid basis. This view was shared by the courts in their tendency to decide in favour of the child, requiring schools to make accommodations.[80]

76 The Maori word for family.
77 Which have been described as 'ghettoising' children with disabilities
78 Ministry of Education (2012), Supports and Services for Learners with Special Education Needs/Disabilities, April.
79 n 79, p 3.
80 For example, in *Finney v Hills Grammar School* [1999] HREOCA 14 (20 July 1999), and *Stephanie Travers by her next friend Wendy Travers v New South Wales* [2001] FMCA 18.

The next 'group' of cases concerned the failure of schools to provide learning support for children with disabilities, in order that they had the same learning opportunities as those who did not. Although they were pursued under either the Commonwealth DDA or the equivalent state legislation, the results were along the same lines. In *Catholic Education Office v Clarke, Hurst v Queensland* and *Beasley v Victoria Department of Education and Training (Anti-Discrimination)*,[81] the courts and tribunals all held that the failure to provide support for the hearing-impaired children to enable them to learn in Auslan, the official Australian language for the deaf, amounted to either indirect or direct discrimination. It may be noted however, that the courts have not shown such sympathy in the cases concerning school exclusion for anti-social behaviour (discussed below) where issues of school safety are been the overriding factor.

The 2005 mandatory Standards were a major step forward in clarifying the educational rights of students with disabilities and the responsibilities of schools. They apply to all providers, across all sectors and require them to make reasonable adjustments to assist the student with the disability to be as far as possible on the same basis as a student without. The obligations are in respect of enrolment, participation, curriculum development, accreditation and delivery of courses and programs, and support services. Complaint of breach of the Standards' obligations is dealt with at Federal level under the *Disability Discrimination Act 1992* (Cth), while complaint of disability discrimination in education generally may alternatively be taken to the particular state or territory human rights agency, court or tribunal pursuant to the legislation of that jurisdiction. This constitutional anomaly has resulted in jurisprudence and judicial opinion from a variety of decision making bodies. Generally however the decisions support wherever possible the equal opportunity rights of children with disabilities, and a concomitant responsibility on the state and school to make accommodations wherever possible and reasonable.

A perusal of education decisions makes it clear that courts and tribunals are careful to decide each case on application of its particular facts to the statutory requirements for direct or indirect discrimination. In 2009, the Victorian tribunal (VCAT) allowed an action claiming indirect discrimination for a school's failure to provide one-on-one support for a student with impaired psychological function and learning disorders.[82] But, in *Abela v Victoria*[83] the Federal Court of Australia dismissed a claim of direct and indirect discrimination under sections 5 and 6 of the *Disability Discrimination Act 1992* (Cth) in relation to a school's alleged failures in the education of the applicant's son, a child with special needs. Recently also the Victorian Civil and Administrative Tribunal (VCAT) has considered two separate allegations against an independent school relating to children with severe behavioural difficulties, which were manifestations of a disability.[84] Both cases implicate an educational authority's obligation to make rea-

81 [2004] FCAFC 197, [2006] FCAFC, [2006] VCAT 1050 respectively.

82 *State of Victoria v Turner* [2009] VSC 66 (4 March 2009). *See also Phu v State of New South Wales (Department of Education and Training) (No 3)* (2009) NSWADT 282 (12 November 2009).

83 (2013) FCA 832

84 In 2009 a clarification was inserted at the end of the definition of disability to the effect that 'disability' includes behaviour which is a manifestation of symptom of the disability – *Disability Discrimination and Other Human Rights legislation Amendment Act 2009* (Cth).

sonable adjustments for a student with a disability but they demonstrate a reluctance to place too great a liability on schools where it is not justified on the facts. In *USL obo her son v Ballarat Christian College (Human Rights)*[85] it was alleged that the lack of progress of an ADHD child was due to the failure of the school to make reasonable adjustments. Harbison J of the Tribunal, in dismissing the claim, was careful to point out that the decision was made on those particular facts, for example that no evidence was advanced as to diagnosis of condition. She found that the child's lack of progress was because of the child's behaviour and not his disability and there was no unlawful discrimination on the part of the school. Similarly a claim made in *AB v Ballarat Christian College (Human Rights)*[86] was dismissed by the Tribunal. There various allegations were made of the failure of the school to make reasonable adjustments in various areas of the education of a boy with Asperger's syndrome, including his being prevented from attending a school camp.

Despite the policy of inclusion and the attendant obligations on providers imposed by the Standards and the various federal, state and territory disability anti-discrimination legislation, these cases clearly show that the courts will only go so far. They demonstrate a conservatism and practicality in the extent of the responsibility.

The difficulties of schools, courts and tribunals when confronted with such issues are even greater when they concern disciplinary action taken by a school to exclude a child with a disability.

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D: Staying in school – not: exclusion through school disciplinary measures

Exclusion from school has severe impact upon exercise of right to education. Research shows that even shorter term suspension disengages a child from schooling and that very often they fail to return to school. Research also shows clearly that disengagement from school is very often to set the student on a path of offending and thus into the criminal justice system – called in the US 'the schoolyard to jail yard track'. In both New Zealand and Australia, the numbers of students excluded from school by disciplinary action is high and rising, with an overrepresentation in both countries of indigenous students, Aboriginal and Maori.[87]

In New Zealand, in considering the power of school to exclude under the *Education Act 1989,* McGechan J of the High Court sent a clear message in relation to policies which required mandatory school exclusion. In the 1999 the case of *M v Palmerston North Boys High School* he said that in taking such action the school must ensure that: 'Results must not be fixed instead they must be fair'. This standard was adopted by the Ministry of Education in their Guidelines to schools in considering such action under

85 [2014] VCAT 623 (2 June 2014).

86 [2013] VCAT 1790 (21 October 2013).

87 In Australia, the statistics are to be found on the websites of each state and territory Department of Education. For New Zealand statistics see www.educationcounts.govt.nz. See also http://www.stats.govt.nz/browse_for_stats/people_and_communities/pacific_peoples/pacific-progress-education/schooling.aspx.

the provisions of the *Education Act 1989* and the accompanying Rules issued shortly after that decision.[88]

However, this section of the article aims not to consider the right to education and school exclusion generally, but rather the complex issues surrounding discipline of a child with a disability. There a school must balance the right to education of the child who demonstrates anti-social behaviour perhaps as a result of that disability, against the right of all students to education in a safe environment, free from disruption and conducive to learning. Recently, in 2013, the New Zealand Ministry of Education in their assistance to school principals, emphasised the challenges for schools in managing student behaviour when working with students with special education needs and pointed to Individual Education Plans to help support schools to work with students, families and sometimes agencies to support students' access to schooling.[89]

Both Australia and New Zealand courts and tribunals have seen challenges to disciplinary decisions, particularly school exclusion, linked to disability. While accepting that each case is decided ultimately on its own facts, the issues are essentially the same and they perhaps evidence differing trends. The decisions and the reasons behind them serve to highlight the range of complexities in a policy of 'mainstreaming' or inclusion which is arguably not underpinned by the substantial resources needed.

In Australia this is particularly clear in the prolonged battle between the foster parents of Daniel Hoggan and educational authorities which lead to the High Court in *Alex Purvis on behalf of Daniel Hoggan v NSW (Department of Education and Training)*[90] All parties it could be said, had different approaches to what was in the best interests of Daniel, a child who had severe disabilities resulting from a brain injury. His behaviour could be aggressive and sometimes violent. The mainstream public school was initially reluctant to enroll Daniel but did so following the first decision of the Human Rights and Equal Opportunity Commission in 1997. There followed then (from 1997-2003) a long period of meetings, behaviour plans, suspensions, further rulings of the Commission and finally expulsion from the school. Daniel's suspension was heard in the Federal Court then the High Court (which both overturned the Commissioner's decisions). The main issue all the way was: was Daniel excluded from the school for his behaviour which he chose, or for his disability, over which he had no control? Finally, in a split decision, the majority of the High Court decided the former, and that the school had done enough. The dissenting judges (Kirby and McHugh JJ) felt it could have done more. The reasoning of all the judges provides important commentary on the thorny issue of a child who behaves in a manner which threatens the safety of the school environment, and whether or not this behaviour is a manifestation of his disability which carries with it heavy responsibilities towards the child on the

88 Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999. For a case evidencing that standard, see *Boviard & the Board of Trustees of Lynfield College v J (Suing by his Litigation Guardian)* [2008] NZCA 325 (19 May 2008) per O'Regan, Priestley & Heath JJ.

89 New Zealand Ministry of Education *Te Tahuku o te Mataurenga* http://www.minedu.govt.nz/NZEducation/EducationPolicies/Schools/StanddownsSuspensionsExclusionsExpulsions/PartTwo/Section2CreatingProceduresAndProcesses.aspx.

90 [2003] HCA 62.

basis of equal opportunity, or whether the overriding factor is the safety and ability of all children in the school to exercise their right to education.[91] This decision led to a 2009 clarification of the definition of 'disability' in the Commonwealth *Disability Discrimination Act 1992* (Cth) (discussed above) to state that behaviour which is a manifestation of the disability cannot be separated from disability. The effect is that to exclude a child for behaviour which he or she is unable to change because of disability is to expel for the disability, and that amounts to unlawful discrimination.[92]

In light of this Australian decision and subsequent clarification to the Act, it is of interest to note a recent New Zealand decision, *A v Hutchinson & Board of Trustees of Green Bay High School.* [93] Here Faire J of the High Court, overturned the school's decision to expel a child who had Aspergers syndrome, action taken essentially because of the boy's continual anti-social and disruptive behaviour. The judge found that staff at the school had a responsibility, and should have been able to react differently, to the boy's behaviour. The final precipitating incident concerned the boy and his skateboard and the staff were aware that in such situations, the boy needed time out to de-stress. At the time of writing it is reported that the school are planning to appeal the decision.

While there is seemingly a differing attitudes between the courts of the different jurisdictions it would be hasty to reach any conclusions from this. There are notable differences between the origins of the two cases. The latter was an action in public law claiming administrative review of the school's decision, rather than being founded on an allegation of discrimination. Secondly, while in the New Zealand case the boy had demonstrated anti-social behaviour generally, not much was made of safety issues faced by the school. The cynical could speculate that this is due in part to the underlying effect of the accident compensation system in New Zealand which bars compensatory damages for personal injury, precluding the possibility of a school facing litigation for harm suffered by other students or teachers. That aside, the different decisions do, on the face of it, seem to indicate an attitude by the New Zealand courts more resolutely based on the right of the individual child to an education no matter what, and placing greater emphasis on the responsibility of the school to accommodate that right and act accordingly.

91 An issue faced frequently by courts elsewhere, notably beginning in 1996 in the UK in *R v London Borough of Camden and the Governors of the Hampstead School: Ex Parte H* [1996] ELR 360. In relation to conflicting responsibilities and tensions, note the now famous words of Lord Hobhouse of Woodborough in *Re L (a minor by his father and litigation friend) (Appellant)* [2003] UKHL 9, at para 34: "A school is a complex organic entity ..." For a comprehensive discussion of the issues involved in school exclusion and school safety see Varnham, S. (2004), 'Getting Rid of Troublemakers': The Right to Education and School Safety – Individual Student vs School Community', *Australia and New Zealand Journal of Law and Education,* 9 (2), 53.

92 *Disability Discrimination and other Human Rights Legislation Amendment Act 2009* which inserted into Subsection 4(1) (at the end of the definition of *disability)* 'To avoid doubt, a *disability* that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability'.

93 *"A" v Hutchinson & The Board of Trustees of Green Bay High School* [2014] NZHC 253 (19 February 2014).

IV Particular Current Issues Relating to Accessibility and Acceptability of Education

Questions relating to access and acceptability of education in Australia in two areas are currently receiving attention. They arise out of first, a lack of available, accessible and acceptable schools in some areas; and secondly, the lack of provision for the education of children of asylum seeking families in offshore and mainland detention centres.[94] Australia's fulfilment of its obligations under international conventions, particularly in this context Article 28(1) United Nations Convention on the Rights of the Child (UNCROC) has been implicated. Research reveals a litany of reviews and reports yielding few practical outcomes.

A: Education of Children in Rural and Remote Areas

1 Lack of available schools

Australia is a very large and sparsely populated country with most of the population living on the eastern seaboard in cities such as Sydney and Melbourne. However there are an appreciable number of children and their families living in remote and rural areas. Two interrelated issues of considerable significance particularly affect Aboriginal and Torres Strait Islanders who live in these remote areas particularly in Queensland, South Australia, Western Australia and the Northern Territory. The first is the lack of available schools; and the second is the large numbers of these children who fail to engage in the schools that there are, either through lack of accessibility or through persistent truancy and disengagement.

In 1999 the Human Rights Commission commenced an inquiry into the exercise of the right to education in these areas within five criteria including access, acceptability in cultural and other ways; and adaptability in terms of meeting different circumstances and changing needs of each individual child. It found that these children faced considerable difficulties, particularly in relation to transport, for example: 'In Mungindi in Northwest New South Wales, with a population of 1000, isolation and lack of sealed roads mean that in wet weather some children cannot attend school for weeks'[95]. This inquiry found further that there was a considerable lack of available and accessible schooling for children in Indigenous Homeland Communities. For example, there were 15 East Arnhem Land Communities (in the Northern Territory) without education provision and thousands of children who had no access whatever to school education. Where education was provided, it was limited to basic primary with a near total lack of secondary provision. In speaking to these findings, the Human

94 Australia's Migration Act 1958 requires people who are not Australian citizens and do not hold a valid visa to be detained. Unless they are given legal permission to remain in Australia by being granted a visa, such unlawful non-citizens must be removed from Australia as soon as reasonably practicable. https://www.immi.gov.au/media/fact-sheets/82detention.htm Retrieved 4 September 2014.

95 Sidoti, C., Human Rights Commissioner (2000), '*Access to Education: a human right for every child*', 29th Annual Federal ICPA Conference, Griffith NSW, Australia, 3 August.

Rights Commissioner said that because of the low level or lack of education generally in these communities, there was little or no support for distance education rendering it to be not a viable option. While the considerable difficulties in addressing this problem must be appreciated, it is hard to find evidence that much has changed since this Report. In 2011 the Australian Government Department of Education released an Aboriginal and Torres Strait Islander Education Action Plan 2010 – 2014.[96] This plan committed all state and territory governments to a unified approach for improving educational outcomes from those in the most remote areas to urban schools. Although education ministers in each jurisdiction are required to publish an annual report on their progress, evidence of improvement is elusive.

2 Lack of Engagement in Schools

In addition, lack of engagement through persistent truancy is a significant problem. There are a multitude of reasons suggested but action to address them is slow. One example is that education and the school curriculum are dependent on English which many of these children do not speak. This alone perhaps raises issues relating to rights in respect of their language and culture.[97]

The first meeting of the Council of Australian Governments (COAG) 13 December 2013, with the new Federal Coalition Prime Minister Tony Abbott, agreed to a range of measures to improve indigenous school attendance. The measures agreed however show a disappointing lack real initiative and respect for research into why these students fail to attend and engage in available schools. Government measures to encourage school attendance relate almost solely to reporting and enforcement rather than having a co-ordinated social response at their base.[98] Importantly they say little in terms of improving reasonable access to education for those children for whom there is no practically available school.

It is clear that a lack of education for all children is a national issue which cannot be underestimated for society and for individuals, in terms both of propensity for criminal activity and lack of life expectations. As reported by the Australian Law Reform Commission:

> In Australian society, poverty is generally related to unemployment and subsequent reliance on welfare. The relationship between educational achievement and employment status has been well documented. People with a lower level of educational achievement are more likely to be unemployed than those with a higher level of attainment. [99]

In New Zealand, its small size, geography and the urban concentration of its population including Maori indigenous people, means that it does not suffer from the diffi-

96 https://education.gov.au/aboriginal-and-torres-strait-islander-education-action-plan-2010-2014-0.
97 There are hundreds of Aboriginal languages in Australia.
98 COAG Communique, 13 December 2013, at p 3. http://www.coag.gov.au/node/516.
99 n 60, (2004) ALRC 84, Chapter 10 [10.53].

culties of Australia in terms of providing reasonably accessible schools for all children. However it is not immune from children who for whatever reason do not or will not exercise their right to education, and fail to attend school on a regular basis. Statistics show an overrepresentation of Maori and Pacific Islander children.[100] The recognition of the strong negative predictors from failing to engage in education was stated by Judge Becroft, Principal Youth Court Judge:

> As we all know, non-participation in school is probably the greatest correlative to youth offending. We also know that learning difficulties, behavioural difficulties, and school disengagement often run hand in hand, and compound the risks of offending and re-offending.'[101]

In 2010 it was reported that there were around 2300 children missing from the New Zealand school system on any given day through long-term truancy or failure to enrol, and a policy of pursuing prosecutions of errant parents was announced. There is little evidence of improvement in school attendance since this policy was implemented. Beginning in June 2013 the New Zealand Ministry of Education has rolled out an integrated national Attendance Service (AS) throughout the country. It has a new focus for its aim of effectively managing student attendance and reducing truancy and the time taken to return students to education.[102] While, pursuant to the *Education Act 1989*,[103] parents have a responsibility to enrol and ensure attendance of their children at school, the AS places responsibility on schools also. It requires them to have an attendance management plan or policy, to monitor absences and importantly, to work with the family and *whanau*[104] to help the student return to school. Schools may appoint an Attendance Officer who has a range of powers in relation to truancy, including prosecution.[105]

However, similar to Australia, governments and policy-makers, grappling with the issue of truancy fall back on reactive measures, rather than regarding truancy is a social and human rights issue which requires human rights actions at grassroots level. The current measures are either prosecuting parents for the truancy of their children provided for in most education acts in Australia and in New Zealand[106], and, in Australia, policies of sanctioning the welfare payments of parents operating in South Australia, Queensland and Northern Territory. It could be argued that these are the 'right answer

100 http://www.stats.govt.nz/browse_for_stats/people_and_communities/pacific_peoples/pacific-progress-education/schooling.aspx. The statistics also show a disproportionate number of Maori and Pacific Islander children also disengaged from school through disciplinary exclusion measures.

101 www.minedu.govt.nz/~/media/MinEdu/Files/Boards/Support/ImprovingAttendance2010.pdf.

102 The New Zealand Ministry of Education *te Whare Matauranga,* www.minedu.govt.na/NZEducation/EducationPolicies/Schools/Attendance.

103 ss 23, 24, 25 *Education Act 1989* responsibility to enrol and attend.

104 The Maori word for 'family'.

105 s 31 ensuring attendance at school. For details of the Ministry of Education Attendance Service see http://www.minedu.govt.nz/NZEducation/EducationPolicies/Schools/Attendance/ForBoardsAndPrincipals/AttendanceServices.aspx.

106 And they are not alone, see for example, the UK http://www.the guardian.com/education/2014/mar/25/steep-rise-in-number-of-parents-hit-by-truancy-fines.

to the wrong question', the right question being: why do schools fail to engage young people?

B: Education of children confined in asylum seeker detention centres

In Australia shortcomings in terms of access to and acceptability of education is not confined to children from remote and regional areas. A further area of concern is the lack of provision for education of the large numbers of asylum seeker and refugee children held in detention centres. A 2004 inquiry by the Australian Human Rights Commission (AHRC) into the health and well-being of children in Immigration detention found that:

> The Commonwealth failed to take all appropriate measures to provide children in immigration detention with an adequate education over the period of the inquiry, resulting in a breach of the Convention on the Rights of the Child [Art 28].[107]

While if found that many of the problems were addressed when children began attending local schools,[108] this was only possible with the detention centres such as Villawood and Woomera where there are locally accessible schools. Even then, the children were prevented from attending school activities and excursions, ordinary a large part of education. Instead they were required to return to the detention centre at the end of the school day. Until recently there were no schools available for the many children who are now held in offshore facilities, such as those on Christmas Island, Nauru and Manus Island.

In February 2014 the AHRC launched a further inquiry into the 'impact of immigration detention on the health, well-being and development of children'. A consideration of the exercise of the children's right to education is at the heart of its wide brief to assess whether laws, policies and practices relating to these children meet Australia's international human rights obligations.[109] In July 2014 there were 775 children in locked immigration detention centres. In 14 August 2014, the Coalition Government announced the planned release of the asylum-seeking children and their families into the community, dependent on resolution of their temporary bridging visa. This does not affect the 208 children held on Nauru and 304 children on Christmas Island who arrived after the implementation of the current government policy of no settlement in Australia introduced in July 2013.[110] A groundswell of public opinion driven by

107 The Australian Human Rights Commission (2003), '*A last resort? National inquiry into Children in Immigration Detention*', https://www.humanrights.gov.au/publications/last-resort-national-inquiry-children-immigration-detention

108 Australian Human Rights Commission (2003), '*A last resort? National inquiry into Children in Immigration Detention*', https://www.humanrights.gov.au/publications/last-resort-national-inquiry-children-immigration-detention

109 See Australian Human Rights Commission (2014), Inquiry Discussion Paper, www.humanrights.gov.au/publications/national-inquiry-children-immigration-detention-2-14-discussion-paper.

110 Operation Sovereign Borders - a government policy based officially on the need to deter people smugglers. http://www.customs.gov.au/site/operation-sovereign-borders.asp.

greater availability of information through the media in reporting recent incidents of unrest and self-harm in detention centres, together with the activity of the AHRC in visiting and reporting on the centres, seems to be leading to improvements for these children. There is a long way to go. Of the 518 children of compulsory school age in immigration detention on mainland Australia, on 31 March 2014, 338 were attending local community schools. However, school education for the children on Christmas Island, 160 of compulsory school age, was limited to 2 weeks per child, even though the average length of detainment is 221.5 days.[111] Since the commencement of the 2014 Inquiry by the AHRC it is believed that the Australian government has established a small school on Christmas Island.[112] At the time of writing the Inquiry is continuing to hear submissions.

VI Conclusions and the way forward: The Role of Schools in Human Rights Education

This article is a small snapshot of a wide range of factors impacting upon the exercise of the right to education of children in Australia and New Zealand. Despite the issues considered here, it should be stressed that both countries have robust and effective education systems which benefit most of the nations' children. Generally the governments fulfil their responsibility to create and maintain systems which are realistically and practically accessible to most children. Hand in hand with provision of accessible, acceptable and available schools are corresponding responsibilities for safe educational environments, free from hostility and conducive to learning and adaptable to suit all. Undeniably there are shortcomings in the practice of these responsibilities, leading to threats to, or negative impact on, the exercise of the right to education. Some have been touched on here. There are many others, such as the right to language and culture in education, the right to freedom of expression, and the right to be secure from unreasonable search and seizure, all of equal importance.

To conclude here would be telling only part of the story. The key to the exercise of the right to education into the future must be through education systems prioritising and taking the lead in human rights and citizenship education. Most children in Australia and New Zealand spend at least 11 years in a school. Arguably that school provides the template for the rest of their lives, including their ability to function as citizens within a democratic society with a strong sense of human rights and social justice. The values incorporated within education systems and simply, the way in which a school behaves, play a significant part in this. Educating for human rights is an integral part of the responsibility of developing citizens for a free, liberal and democratic society. It requires both formal classroom teaching and learning, and processes and procedures for practising citizenship and human rights within school communities.

111 Figures available the website of the Department of Immigration on http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-march2014.pdf and https://www.immi.gov.au/media/fact-sheets/82detention.htm.

112 Address by Professor Gillian Triggs, President of the Australian Human Rights Commission, at the Faculty of Law, University of Technology, Sydney, Australia, 14 August 2014.

The governments of both Australia and New Zealand have in recent decades paid increasing attention to human rights education in schools. This is as it should be, although its implementation in real terms is patchy. The New Zealand government has stated that human rights are a central theme of the New Zealand curriculum.[113] In its value statements it sets out to 'reflect cultural diversity', and to 'recognise the principles of the Treaty of Waitangi' (the founding document for the nation of *Aotearoa* New Zealand entered into between Maori chiefs and Queen Victoria) as central. In a recognition that there is much to be done in effectively integrating human rights education and practice in schools,[114] there are increasing non-government initiatives underway, such as 'Building Human Rights Communities in Education *He Whakatu Tika Tangata-a-iwi Whanui*', established by Amnesty International, the Development Resource Centre, the Human Rights Commission, the Office of Children's Commissioner and the Peace Foundation.[115]

In Australia, a consideration of a new Human Rights and Civics and Citizenship curriculum was initiated in 2011 as part of the National Curriculum review.[116] In the Civics and Citizenship Draft Shape paper, it states an informing principle as:

> 10 b) The values on which Australia's democracy is based include the importance of democracy, active citizenship, the rule of law, social justice and equality, respect for diversity, difference and lawful dissent, respect for human rights, stewardship of the environment, support for the common good, and acceptance of the rights and responsibilities of citizenship.

A recent study on the progress of implementation of human rights education in Australian schools concluded however that:

> Despite opportunities to effectively integrate human rights education into school programs provided by a new Human Rights Framework and National Curriculum, there have been only limited outcomes to date for human rights education. Failure to systemically integrate human rights principles, topics and practices into school

113 Human Rights and the New Zealand Curriculum (2007), *Rights, Respect and Responsibilities*, www.rightsined.org.nz.

114 The New Zealand Human Rights Commission (2010), Human Rights in New Zealand 2010 – Nga Tika Tangata O Aotearoa, Wellington, New Zealand.

115 Although this is a voluntary program, the small number of schools who participated recorded considerable success in terms of improvement in classroom behaviour, reduction in bullying and higher personal expectations of behaviour.

116 Australian Curriculum and Assessment Reporting Authority (ACARA), Australian Government, Canberra. http://www.acara.edu.au/verve/_resources/Civics_and_Citizenship_Draft_Shape_Paper_for_Consulation_June_2012_final.pdf.

> curriculum has resulted in a missed opportunity to create a human rights culture and improve understandings of human rights for Australian students.[117]

This is in line also with the Australia Child Rights Taskforce 2011 Report to the United Nations on Australia's progress in implementation of UNCRC.[118] In 2012, a commitment mapped out in The National Human Rights Action Plan (for the prioritising of human rights education)[119] was the granting of funds to non-government organisations (NGOs) to continue to work with schools, states, territories and curriculum authorities to ensure that human rights and principles are included in the national curriculum.[120]

Articles 26(1) and 26(2) of the Universal Declaration of Human Rights recognises that exercise of the right to education is critical to 'strengthening of respect for human rights and fundamental freedoms' and promoting 'understanding, tolerance and friendship among all nations, racial and religious groups.' The United Nations Convention on the Rights of the Child sets out, among its aims of education, a respect for human rights and a sense of responsibility towards others and respect for diversity.[121] In December 2011 the UN General Assembly adopted the *Declaration on Human Rights Education and Training* which identified the three key elements as: education about human rights, education through human rights and education for human rights. While this article has pointed to many human rights issues within education which require attention now, it is important to conclude with the need for prioritising human rights education as the way forward, as the path to a much greater recognition and protection of human rights in society generally. There is much for both countries to do. In their recent study Payne, Oguro and Varnham point to the valuable policy tool published by The Council of Europe (Kerr et al, 2010) for decision makers implementing education for democratic citizenship and human rights education. There is perhaps much to be learnt from this review of European experiences which identifies some of the key components required for successful implementation.[122]

> Education is the most powerful weapon which you can use to change the world. (Nelson Mandela)

117 Payne, A.M., Oguro, S. and Varnham, S. (2014) 'Integrating human rights education in schools: legislation, curriculum and practice' (forthcoming). See the full report: Burridge, N., Chodkiewicz, A., Payne, A.M., Oguro, S., Varnham, S. and Buchanan, J. (2013), *Human Rights Education in the School Curriculum*, Cosmopolitan Civil Societies Research Centre, Faculty of Arts and Social Sciences, University of Technology, Sydney; also Burridge N. and Chodkiewicz, A. (2010), 'Approaches to Human Rights Education: A study of school education', *Learning and Teaching*, 21-37.

118 Child Rights Taskforce (2011), *Listen to Children'*, NGO Child Rights Report, Australia. http://www.nyclc.org.au/images/2011report.pdf.

119 Commonwealth of Australia (2012), *National Human Rights Action Plan*, http://www.ag.gov.au/Consultations/Documents/NationalHumanRightsActionPlan/National%20Human%20Rights%20Plan.pdf.

120 For a comprehensive discussion see Gerber, P. and Pettitt, A. (2013), 'Human Rights Education in the Australian Curriculum' in Gerber, P. and Castan, M. (eds), *Contemporary Perspectives on Human Rights Law in Australia*, Lawbook Co, Australia.

121 Articles 28 and 29 UNCROC.

122 Payne, A.M., Oguro, S. and Varnham, S. (2014), 'Integrating human rights education in schools: legislation, curriculum and practice' (forthcoming).