

***IN WHOSE INTERESTS: THE USE OF ASSESSMENT RESULTS FROM THE PERSPECTIVE OF
THE STUDENT***

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Abstract

Assessments and the use of student assessment information for external reporting purposes, whether for child, teacher or school performance, are increasing. Legislation in a number of nations, including England, Australia and the United States of America (U.S.), now requires various forms of external assessment and reporting conditions. Often such reporting is linked to funding. In Australia, the format and timing of reporting of student achievement to parents have also been legislated at the federal level.

This paper examine students' rights to engage in assessment decisions about their own education, and to control the use of their assessment outcomes and information from a legal perspective, including human rights and privacy legislation, constitutional rights and discrimination law. The discussion considers Australian law in terms of its legislative system, policies and case law, with comparisons with U.S. law. These jurisdictions are of interest because, although they have similar legal systems, Australia is a signatory to the United Nations Convention on the Rights of the Child while the U.S. is not.

Introduction

Assessment has become a major focus of education and education policy in most nations through increased accountability agendas. These agendas are driven through concerns about student achievement standards, often informed by international comparative studies of achievement, such as the OECD Programme for International Student Assessment (PISA).

In Australia and the U.S., accountability has also been used to drive national education policies, usually through the power of the purse (Mawdsley & Cumming, 2004). In Australia, despite education being notionally allocated as a responsibility of the states in the Australian Constitution,¹ nationally-developed and administered tests of literacy and numeracy have been mandated through the *Schools Assistance (Learning Together—Achievement Through Choice. and Opportunity) Act 2004*, the act allocating federally-collected income tax to the states for education provision. In the U.S., the *No Child Left Behind Act 2001* (NCLB), a similar funding act, has implemented requirements for states to report student achievement and annual progress against standards. Some U.S. states have resisted federal control over mandated testing by enacting their own procedures. For example, California state law permits parents in individual school districts to opt their children out of testing, a law that puts California in direct conflict with federal NCLB and Title I funding eligibility requirements (NSBA, July 3, 2008).² Other states have unsuccessfully pursued litigation to seek exemption

¹ *Attorney-General (Vict.); Ex Rel. Black v. Commonwealth* (1981) 146 CLR 559. The issue under dispute was allocation of through the federal provision grants to religion-affiliated schools. At [38]: 'The conditions of the grant in this case relate to a subject matter of State power. Education is within the State legislative area: and its furtherance is undoubtedly a concern of the State. The operation of the conditions depends on the State's acceptance of the grant. It is no answer to the consequence of this fact that economically speaking a State may have little choice.' This explicit matter has not subsequently been tested by the states or Commonwealth.

² See National School Boards Association (NSBA) *Legal Clips*, July 3, 2008. The NCLB problem is that a sufficiently large number of parents exercising this option in the Lagunitas School District has meant that the

from NCLB requirements³ or to challenge the adequacy of federal funding.⁴ The U.S. Department of Education (USDOE) has somewhat modified its rigid penalties by permitting six states with large numbers of urban student populations to use alternative assessment processes to improve learning (NSBA, June 26, 2008).⁵ What has become apparent from a recent Center on Education Policy (CEP) study (Kober, Chudowsky & Chudowsky, 2008) is that, while math and reading test scores have improved since NCLB's enactment in 2002, it is not clear how much this improvement is due to NCLB and, even if NCLB was a factor, how much was actually due to states' lowering test standards so that more students could pass. The Thomas B. Fordham report on NCLB found that the lowest-achieving students have made rapid gains since 2002 while those at the top essentially languished, reflecting the views of teachers surveyed that they felt pressure to focus on those children struggling the most (Duffett, Farkas & Loveless, 2007). What is worth noting in the U.S. is that, while the NCLB has brought student assessment into center stage, the mechanisms for effecting changes in assessment involve decisions by persons other than the students who are being assessed. The concept of 'best interest of the child' which plays such an important role in other countries in addressing children's rights has only a very limited role in the U.S., primarily in settling custodial disputes among caregivers (Mawdsley, 2005).

What is common to such accountability policy actions, is the expectation that student achievement can be improved through assessment drivers — that is, requirements that students complete an increasing number of external assessments, and that they improve their performance on the assessments and over time. Implicit in this, of course, is the assumption that students will be trying their best and that they are in accord with the policy directions and implementations. However, students can exert their rights not to play by not trying:

Based on my knowledge about the school system and youth culture in my own part of the world, in particular Norway and Denmark, I would claim that many students in these countries assign very little value to ... the PISA (Programme for International Student Assessment) test ... the PISA test (does not) have any 'utility value' for these Scandinavian students; the results have no consequence, the items will never be discussed, there is no feed-back, results are secret and do not count, neither for school marks nor in their daily lives. They do not count for students' future career-related or life goals. Given the cultural and school milieu and the values held by young learners in e.g. Scandinavia, it is hard to understand why they should choose to push themselves in a PISA test situation. (*Sjøberg, 2007, p. 17*)

Indeed, Norwegian students exercised their rights within assessment regimes more strongly than claimed here. In 2005, through advocacy of the Norwegian Student Union, students boycotted the imposition of national tests they felt were not linked to their curriculum and poorly-conceived (Tveit, forthcoming). A sufficiently high proportion of students simply did not turn up (45 % in one subject area), and the proposed assessment system was reviewed.

However, it is difficult find instances of student rights in assessment outside the European continent with its history of student democracies, and certainly not in the jurisdictions studied here. The questions then that arise are whether it is desirable for students to have more rights in assessment, given current policies and educational importance, and, if so, how such rights should be framed?

Educational imperatives for student rights in education and assessment

The previous discussion has considered the policy-based imperatives for educational assessment and goals to improve student learning. However, at the same time as these

district cannot meet the NCLB requirement that at least 95% of students in every grade at every school take the test required in their state.

³ NSBA *Legal Clips*, June 26, 2008. See *Arizona State Dept. of Educ. v U.S. Dept. of Educ.*, No. CV-06-1719-PHX-DGC (D Ariz, 2007) (upholding federal government's one year exemption for reporting test results of English language learners over state's claim of three-year exemption).

⁴ See *State of Connecticut v Spellings*, 549 F Supp 2d 161 (D.Conn. 2008); *City of Pontiac v Spellings*, 512 F 3d 252 (6th Cir, 2008), en banc hearing order, May 1, 2008.

⁵ The six states are Florida, Georgia, Indiana, Illinois, Maryland, and Ohio.

external drivers are directing assessment practices, education and assessment experts have long-identified that best practice to promote learning requires student engagement with learning and assessment. Such practices include more focus on individual student progress (assessment for learning), and engagement with students in the assessment process itself, at least at a minimum through self-assessment (Black & Wiliam, 1998; Broadfoot, 2002; Weeden, Winter & Broadfoot, 2002).

The second imperative for active student engagement in education and assessment decision-making is the rhetoric, common to most nations, that a highly important function of education is to develop active, responsible and informed global citizens.⁶ The state and territory ministers of education, in the *Future of Schooling in Australia*, recently identified the need for

civics and citizenship in the curriculum, to nurture citizenship and civic behaviour amongst our students ... (First Ministers, 2007, p. 21)

To enhance student engagement in learning and assessment and development of self-responsibility, schools need to be more democratic institutions, with students recognised as citizens, not 'citizens-in-waiting'. Yet 'schools remain essentially authoritarian' (Ostler & Starkey, 2005, p. 137).

By developing and applying curriculum, teachers, schools and bureaucrats guide the process of learning, but it is the students themselves that must develop capabilities to deal with their own futures and democratic curricula must be designed to guide that process (Bardsley, 2007, p. 498)

These educational imperatives argue for more active involvement by students in educational matters, including decision-making in assessment policies and practices that are of such consequence for their futures, engagement that extends even beyond self-assessment within established assessment regimes.

In England, researchers have engaged with 'student voice', including assessment matters (Hodgson & Spours, 2003, 2005), and argued that 'the views of learners ... (should be) actively sought in the construction' of new assessment systems (Hodgson & Spours, 2005, p. 116). In Ireland, strong argument has been made that child has the right 'to be heard and to play an active part in decisions regarding his or her education education ... (and) that procedures (should) be introduced to ensure that children are provided with the opportunity to express their views on the running of schools in matters of concern to them' (Children's Law Centre, 2002, p. 2). The *Education Act 1998* (Ireland) allows for involvement of students in the operation of the school, having regard to the age and experience of the students (s 27(2)), and the establishment of student councils in post-primary schools, to 'promote the interests of the school and the involvement of students in the affairs of the school, in co-operation with the board, parents and teachers' (ss 27(3), (4)). The nature of the interests is not restricted by the Act and may be taken to include academic matters.

The arguments made in Ireland draw on the rights provided to children through the United Nations *Convention on the Rights of the Child*. These rights, and more explicit jurisdictional rights in Australia and the U.S. form the basis of the following discussion, with specific focus on rights with respect to educational assessment.

Imperatives under law: Rights in education under the *Convention on the Rights of the Child*

The *Convention on the Rights of the Child* (CRC) (UN, 1989) provides the basic right to education of all children, generally regarded as the right to a free education (although also compulsory) (Article 28). However, three important rights of relevance to education and educational assessment accompany the basic right to education. Firstly, in all activities, including education, 'best interests of the child shall be a primary consideration' (Art 3). Secondly,

⁶ Indeed, Norwegian students do very well on the international tests on matters of citizenship and democracy (Tveit, forthcoming).

States Parties shall assure to the child who is capable of forming his or her own views *the right to express those views* freely in all matters affecting the child, *the views of the child being given due weight in accordance with the age and maturity* of the child. (art 12 (1)) (emphasis added)

with parents or others legally responsible for the child having rights to provide direction and guidance ‘in a manner consistent with the evolving capacities of the child’ (art 5). However, a right bestowed in CRC highly relevant to the current accountability agendas is the right that ‘[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, ... nor to unlawful attacks on his or her honour and reputation’ (art 16(1), with protection of the law guaranteed (art 16(2)).

It is also worth noting that, in keeping with national goals of civic responsibility previously discussed, CRC also proposed that the right to education included the ‘preparation of the child for responsible life’ (art 29 (d)).

In Australia, many of these rights have been recognised in other spheres. In family law, the *Family Law Reform Act 1995* (Cth) states that a child’s ‘best interests’ are ‘paramount consideration’ in making decisions regarding a child (eg, s 60CA) and that determination of such decisions should include ‘any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s view’ (s 60CC(3)). In medical law, the *Gillick* competency has guided children’s capacity to direct their own medical treatment, applied in a noted Australian case known as *Marion’s case*.⁷ In *Gillick*,⁸ Lord Scarman stated (pp.183-4)

Parental rights ... do not wholly disappear until the age of majority. ... But the common law has never treated such rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law ... is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.

In *Marion’s case*, the Australian High Court noted (Deane J, [3]-[6]):

The age at which a person becomes an ‘adult’ in this country is ... fixed by legislation as eighteen. That does not mean that a person lacks all legal capacity until she or he reaches that age, or that the views of even a young child will ever be completely irrelevant ...

The common law has long recognized that the transition from the complete legal disability of the newly-born baby to the full capacity of the mentally competent adult is, in many respects, a gradual one ... Well before a young person reaches the age of eighteen, she or he possesses legal capacity in a variety of different areas: the capacity to commit (and to be liable to be punished for) crimes requiring criminal intent; within limits, the capacity to make a contract and to be guilty of a tort; subject to any necessary authorization, the capacity to marry...

The tension between the law’s recognition of the gradual transition from the disability of infancy to the full capacity of adulthood and such extreme judicial statements of the extent of the rights of a father with respect to his legitimate children who have not reached the age of full adulthood must be resolved in this country by the rejection of the extreme view that parental authority persists unabated until a child attains full adulthood.

The most important influence making it inevitable that the extreme view of parental authority would yield to the common law’s traditional recognition of the gradual development of the legal capacity of a young person to decide things for herself or himself has, however, undoubtedly been the social fact of the increasing independence of the young. In times when it is not unusual for fifteen and sixteen-year-olds to be supporting themselves as members of the workforce, to insist upon complete parental authority up until the age of eighteen would be to propagate social anachronism as legal principle. In the context of contemporary circumstances, the extreme statements in nineteenth century cases have, depending upon preference for irony, understatement or plain speaking, rightly been dismissed as ‘superbly Victorian’.

⁷ *Secretary, Department of Health and Community Services v J.W.B. and S.M.B. (Marion’s Case)* (1992) 175 CLR 218.

⁸ *Gillick v West Norfolk AHA* (28) (1986) AC 112.

Justice Deane noted that young people may be held responsible for their actions well before the age of 18 years of age, and may be living independently and be self-supporting before legal adulthood also. The law in other fields allows children to be seen as responsible and necessary to decision-making. The following discussion examines provisions in education law for student's responsibility to be involved in decision-making and recognition of their growing maturity in Australia and in U.S., where such rights do not evolve from the *Convention on the Rights of the Child*.

Children's rights in education law and assessment in Australia

Express rights. Rights can be explicit and implied. Although Australia is a signatory to the Convention (CRC), the right to education for children receives little direct mention in legislation. The right to education is established in education legislation of only two states and one territory in Australia — New South Wales (*Education Act 1990* (NSW) s 4), Western Australia (*School Education Act 1999* (WA), s 3.1), and the Australian Capital Territory (ACT) which asserts the right to a 'high-quality education' (*Education Act 2004* (ACT) s 7). Legislation generally establishes a child's entitlement to attend a government school of their choice, within some controls (eg, *Education and Training Reform Act 2006* (Vic) s.1.2.2. (c)).

In Victoria, the *Education and Training Reform Act 2006* establishes the right for all students (and parents) to be able to 'access information about the student's achievement' (s 1.2.1(f)) with schools required to have a school plan stating goals and expectations for the school. However, the plan does not create any rights or entitlements 'capable of being enforced in a legal proceeding' (s 2.3.25). Schools in Queensland are expected to have enrolment agreements (*Education (General Provisions) Act 2006* s 168), stating rights and responsibilities which are to be signed by parents before a school agrees to enroll the child, although acknowledging that this may not be appropriate where students are living independent of parents (s 168). Although an example could not be located, the implications are that the rights and responsibilities are from the school's perspective, and most issues relate to standards of student conduct.

Under the *Education (General Provisions) Act 2006* government schools in Queensland may also establish School Councils to guide 'the broad strategic direction' of the school and to 'improve student learning outcomes' (s 78), with a coopted Year 7 student member for a primary school or an elected Year 10, 11 or 12 student member for a school offering these years, elected by students from those years (s 77). However, in contrast with the Irish Act, Queensland school Councils may not

- (a) interfere with the management by the school's principal of the day-to-day operations of the school and its curriculum; or
- (b) make operational decisions about the use of teaching or learning resources at the school; or
- (c) make decisions about the individual teaching style used, or to be used, at the school; or
- (d) make a decision that is contrary to law or a written policy of the department (s 81).

Contrasting with state and territory education legislation is the *Disability Standards for Education 2005* (Cth) where the language of rights is explicitly used. Rights bestowed for students with disability include the 'right to enrol in an educational institution on the same basis as prospective students without disabilities, including the right to reasonable adjustments that are necessary to ensure that they are able to so enrol on the same basis as prospective students without disabilities' (Part 4), the 'right to reasonable adjustments, where necessary' (Part 5), and the right to be able to access to any course or program of study 'on the same basis as a student without a disability, and without experiencing discrimination', including 'assessment and certification requirements' (s 6.2). Most interestingly, the *Disability Standards* require consultation with students about whether 'the adjustment is reasonable' (s 3.5).⁹

⁹ The *Standards* postdate an assessment equity case *BI v Board of Studies* [2000] NSWSC 921 where a student with attention deficit disorder requested additional time to complete Higher School Certificate examinations. He was granted a break during the examination despite his submission, and that of his medical expert, that a break would be deleterious to his performance. The break and actions by the Board of Studies conformed to then policy and his case was dismissed. However, if the *Disability Standards* had been in place, and consultation with the student had

The rights granted under the *Disability Standards* are stated in terms of equity to students without such a disability. Given the previous discussion, these are, in a sense, hollow rights. However, the *Standards* legislate areas where consideration has to be given to the specific needs of students, with due consultation with the students about their needs. Thus, overall a student has a right to assessments that are not discriminatory on the basis of disability. In Australia, these are the only students where the right to be consulted about educational decision-making can be identified by the authors, especially for matters involving assessment.

However, a number of rights for students can be implied from other legislation and policy.

Implied rights. While the *Disability Standards 2005* (Cth) explicitly bestow rights on students, antidiscrimination acts in the states and territories further legislate against discrimination on the basis of gender, sexuality or race. Therefore a student would be able to appeal to a court or tribunal if assessment were deemed to be discriminatory. However, meeting the burden of a discriminatory argument is difficult for an individual (see Cumming & Dickson, 2007). Such acts do not allow students a voice in determining appropriate assessment or in directing policy.

Right to natural justice. As a nation that operates under rule of law, the expectation in Australia is that in all walks of life the principles of natural justice and fair and equitable practice are expected to apply. This extends to students in the school process when decisions are made that are adverse to their school engagement — ‘Students have the right to natural justice’ (EQ, 2007). While this is an explicit right, its extension to matters of educational assessment must be implied.

Right to privacy. An area of most relevance to use of student assessment information and student rights comes under privacy legislation. The *Privacy Act 1988* (Cth) stipulates uses that can be made of personal information. The Privacy Act applies to all Australian individuals, defined as ‘a natural person’ (s 6). Neither age nor ability are discriminating factors and sections of the act show that children of all ages are protected by the Act. Elements of the Act with respect to medical information indicate that an agency would normally require a child’s consent to provide the information to another, including their parent (s 2.2). More generally, the Australian Commonwealth *Privacy Act* is based on eleven principles, followed by the states and territories. Principle 11 indicates that a ‘record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless: (a) the individual concerned is reasonably likely to have been aware, or made aware under Principle 2, that information of that kind is usually passed to that person, body or agency; (b) the individual concerned has consented to the disclosure; (or) ... (d) the disclosure is required or authorised by or under law’. How often are students informed about the purpose of external assessments, and is their consent for the transmission of their results ever requested? While legislated data collection may make assessment data collection and transmission acceptable under the Principles, it would be also be in keeping with the principles for student consent to participate and to provide results to be obtained.

Implied right to reputation. The tort of defamation in Australia could be considered to give rise to an implied right to protect one’s reputation. Privacy with respect to student results and alleged defamation has been tested in the New South Wales courts.¹⁰ A newspaper, The Daily Telegraph published details of a school’s performance on the Higher School Certificate. The newspaper had stated:

Students from Mt Druitt High School’s class of ’96 blamed poor resources, a lack of discipline and their own tomfoolery for their disastrous HSC results. Students David Deagan, Eid Haddad and Tim Jawabreh admitted classes had been ‘mad’ last year. ‘There was no commitment (among the students),’ Eid, 17 said ‘It was like a game’. David Deagan said the school dux – who expected a mark above 60 – scored 44 out of 100. ‘We had to share textbooks,’ David said.

been a compulsory right, a different outcome may have resulted.

¹⁰ *Bryant & Ors v Nationwide News Pty Limited* [1999] NSWSC 360.

‘There was one book between two or three people and they wouldn’t let us take books home. We would try to photocopy pages or write it out.’¹¹

The publisher’s defence was that the focus of the paper was to blame the system, not the students. The court noted the difficulty of trying to identify an individual who was defamed by the article and whether the claims could be received, although the case had been allowed to proceed. One of the plaintiffs continued the challenge as an individual,¹² overcoming issues raised in the previous case about individual defamation as a member of a class. She contended that *The Daily Telegraph* ‘conveyed of her, in its natural and ordinary meaning the following defamatory imputations’ about her results in her HSC because of a lack of commitment and discipline.¹³ Discussing the various claims made, the judge gave the plaintiff ‘leave to file a Further Amended Statement of Claim’ with revised imputations to be pleaded including that she obtained poor results due in part to a lack of commitment and discipline, or that she had no commitment or discipline for her studies, considering that ‘[t]hese imputations I would find are capable of being conveyed, are proper in form and are capable of being defamatory’.¹⁴ However, the order of costs possibly put considerable burden on the young plaintiff. No further challenges have been identified. It is possible the matter was settled out of court.

A case of interesting comparison between Australian and U.S. jurisdictions was a challenge in the U.S. by a mother on behalf of her children, and others, regarding teacher assessment practices in a school. Her complaint was based on teachers’ practices of students marking other students’ work in class with students then calling out their own grades in class for recording by the teacher. The mother sought an injunction against the practice under the 14th Amendment, a constitutional privacy right, and violation of the *Family Education Rights and Privacy Act* (FERPA) through the disclosure of education records ‘that cannot be released to other students’ (s 1232g(a)(4)(A)), ‘claiming it severely embarrassed her children by allowing other students to learn their grades’. FERPA was enacted to ‘protect the privacy interests of students and their parents with respect to *education records* that contain information about individual students’ (emphasis added) (Dinger, 2001). The legal debate turned on whether the student reporting of grades was an ‘education record’ in the meaning of the Act. The original District Court (Northern District of Oklahoma) hearing determined that FERPA was not violated by a grading practice that allows students to grade one another’s papers because the grades do not constitute ‘education records’. The mother appealed, also claiming that one child had a special case because as a special education student, he had a legitimate expectation of privacy in his grades under the *Individuals with Disabilities Education Act* (IDEA).¹⁵ While the constitutional claim was not found to have a solid basis, the court of appeals identified that such grades on papers recorded by students did represent student education records and were maintained by the students as ‘person(s) acting for [an educational] agency or institution’. Therefore the court of appeals found that the district court had erred in saying the records were not protected by FERPA. The plaintiff was granted injunctive relief to stop the practice.

The School District appealed to the Supreme Court.¹⁶ The Supreme Court reversed the Court of Appeals’ decision, maintaining that the grades were not education records until ‘maintained’ by the teacher, that the students were not ‘person(s) acting for’ the institution.

The court also referred to the teachers’ practice as ‘peer grading’, being generous regarding what in other contexts has been referred to as students working as clerical aides to teachers.

¹¹ Ibid [7].

¹² *Carroll v Nationwide News Pty Limited* [1999] NSWSC 856.

¹³ Ibid [2].

¹⁴ Ibid [20]-[21].

¹⁵ *Falvo, as parent and next friend of her minor children, Elizabeth Pletan, Philip Pletan, and Erica Pletan; and on behalf of others similarly situated, v Owasso Independent School District No. 1-01 (Falvo 1)* 233 F 3d 1203 (10th Cir, 2000).

¹⁶ *Owasso Independent School Dist. No. 1011 v Falvo (Falvo 2)* 534 U.S. 426 (2002).

Correcting a classmate's work can be as much a part of the assignment as taking the test itself. It is a way to teach material again in a new context, and it helps show students how to assist and respect fellow pupils. By explaining the answers to the class as the students correct the papers, the teacher not only reinforces the lesson but also discovers whether the students have understood the material and are ready to move on. (*Falvo 2*, unpaginated)

However, part of the argument supporting the practice was that its removal on legal grounds

... would impose substantial burdens on teachers across the country. It would force all instructors to take time, which otherwise could be spent teaching and in preparation, to correct an assortment of daily student assignments. ... (*Falvo 2*, unpaginated)

In this series of U.S. challenges, then, the students' rights regarding their assessment performance were not protected by a constitutional right to privacy or a right to privacy regarding education information, including assessment, specifically accorded through its own act, FERPA. Further, the convenience of teachers' practices (at some times identified in terms of learning improvement) outweighed the rights of the students to privacy and reputation. One wonders the outcomes of such a practice if it had been brought in Australia under discrimination law, privacy law or under the governance of the CRC and student rights, especially the right to protection of reputation. A far stronger statement of the pedagogical benefits (and public interest) might have been necessary to convince the courts that the practice was equitable for all, and not a violation of privacy.

Current legislation regarding transmission of student assessment data

We noted at the beginning of this paper that federal legislation in Australia was directing educational assessment policy — including the nature of external assessments to be undertaken — and reporting to parents. The *Schools Assistance (Learning Together – Achievement through Choice and Opportunity) Act 2004* (Cth) does not define 'child' except for a child with disabilities (s 4). It would appear the intention of the Act is to apply across all levels of schooling. To receive funding, state Ministers agree to provide to 'parents, guardians or other persons who have care and control of each child' 'a report on the child's achievement against the appropriate national benchmarks for years 3, 5 and 7' (s 14(n)). Further, both government and non-government schools are required to ensure that twice a year schools give 'parents, guardians or other persons who have care and control of each child attending the school student reports, relating to the child, that:

- (a) use plain language and are able to be readily understood by the parents or guardians or other persons who have care and control of the child; and ...
- (c) give an accurate and objective assessment of the child progress and achievement, including an assessment of the child's achievement:
 - (i) against national standards, if such standards are available; and
 - (ii) relative to the performance of the child's peer group at the school; and
- (d) are confidential and deal with the child's academic and non-academic learning... (s 15 for government schools, s 32 for non-government schools)

Regulation 2.3 of the enacting *Schools Assistance (Learning Together – Achievement Through Choice And Opportunity) Regulations 2005* (Cth) provides the following guidelines for reporting requirements:

- (d) the student report must include, for subjects studied, an assessment against achievement levels or bands defined by the education authority or school, being levels or bands that:
 - (i) must be labelled as A, B, C, D, E (or an equivalent); and
 - (ii) should be clearly defined against specific learning standards; and
- (e) the student report must also include, for subjects studied, the child's achievement relative to the achievement of the child's peer group at the school by at least quartile bands.

National assessment programs in literacy and numeracy for Years 3, 5 and 7 are now accompanied by Year 4 and 8 mathematics and science assessments using the Trends in International Mathematics and Science Study (TIMSS) and the National Assessment Program – Science Literacy, and the Year 6 and 10 National Assessment Program – Information and

Communications Technology (ICT) Literacy (sch 1). Reports are to be in keeping with the *Privacy Act 1988* and privacy principles (reg 3.3), although the legislation presumably overrides the need to seek student consent for either their participation or the use of their data for such reporting purposes.

In summary, then, in Australia, assessments are being legislated ‘to improve student learning’ and may be argued by the adults who have developed the legislation and assessments to be ‘in the best interests’ of children. An increasing number of assessments has been imposed on students. Reports for every school year, to an indeterminate age, are to be reported to ‘parents or other persons who have care and control of each child’. The reports are to include an A to E comparative framework and ‘quartile’ comparisons. These legislative requirements have been implemented in an agenda that believes that assessments improve student performance.

In terms of the *Convention on the Rights of the Child*, Australian children have a right to education. However, in matters of assessment, there is no policy or legislation that gives them a voice in such directions or in how they will be implemented. There is no recognition of the educational imperatives. Indeed, the emphasis on constant and relative grading from a young age is contra the substantial research findings of Black and William (1989) on how assessment can improve learning. In contrast to educational calls for greater student engagement in decision-making in curriculum and assessment matters, the *Convention on the Rights of the Child* expectation that children will be engaged in important matters in keeping with their growing competence, and implementation of these principles for both positive and negative effect in family, medical and criminal law, these major educational assessment activities have been proscribed for children without consultation about student perceptions of their ‘best interests’. The *Schools Assistance Act* consists of approximately 29,000 words; however, the words ‘child/ren’, ‘student/s’ appear approximately only 250 times, nearly always about what they will be required to do, and in conjunction with their ‘parent’ or ‘guardian’ ‘in control’ some 20 times.

Perhaps most ironically, the Australian federal assessment requirements require students to undertake assessments in civic knowledge and understanding, and citizenship participation skills and civic values. Schools are to report

- The percentage of students achieving at or above the standard in civic knowledge and understanding in the National Assessment Program – Civics and Citizenship, 2007, Year 6.
- The percentage of students achieving at or above the standard in citizenship participation skills and civic values in the National Assessment Program – Civics and Citizenship. (Regulations, Schedule 1)

Unlike the Norwegian students, Australian students are expected to understand and enact democratic principles in an environment where they have never occurred. However, Australian students do have the same right as the Norwegian students. They do not have to try to do well on assessments that do not matter for them as individuals, and they may decide that they do not want to take all these assessments.

Protection of honour and reputation

Article 16(1) of the *Convention* states that ‘[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, ... nor to unlawful attacks on his or her honour and reputation’. Despite the principles of Australian privacy law, legislated assessments would appear to allow transmission of student data to others. However, the increased number of assessments and regulated processes of reports are already being reported to impact on student self-esteem, starting as young as Year 1 of school.¹⁷ The impact on students at higher levels and across the world is already well-known.

More than 20 per cent of female HSC (Higher School Certificate) students have severe

¹⁷ In a recent research project in school, teachers indicated that young children who did not meet literacy benchmarks state ‘I’m a non-reader’.

depression and suffer from stress, while 30 per cent show symptoms of acute anxiety ... An alarming number of Year 12 students are breaking down in psychological distress in their final years of school as they prepare to sit their final exams. More than 11 per cent of Year 12 boys were seriously anxious, 18.3 per cent are stressed and 15 per cent acknowledge they are depressed. ... More than 53 per cent of male students and more than 60 per cent of female students attribute most of their stress to final year exams. (Education Review, 2008, p. 4)

On a single day in April, the *Times of India* reported two male students in New Delhi hanged themselves because of fears around their marks. A final year bachelor of commerce student hanged herself in Mumbai apparently because she was not prepared for her economics paper and did not want her family to feel ashamed. In 2006, ... 5857 students — or 16 a day— killed themselves due to exam stress. (Campus Review, 2008, p. 6)

The current assessment regimes will not accord with this Convention principle. They will inevitably affect student self-esteem and reputation. They will damage the young lives that education should be protecting.

Conclusion

In Victoria, Australia, the government is seeking to report student achievement as positively as possible within the federal regulations. Further, students are involved in reporting their own progress — ‘for primary students, progress in class whilst secondary students develop and report against yearly personal learning goals’ (Suggett, 2007, p. 13). The directions being taken in Victoria stand out in the Australian experience in their recognition of the growing capacity of students to be involved in academic matters, and in educational terms for the efforts to engage students as learners. However, the remaining discussion has shown that the explicit or implicit rights young people in Australia and the U.S. have within educational assessment are rights to undertake assessments that are specified for them, rights to undertake such assessments in forms that may be more appropriate to them, or rights to be heard in judicial matters about assessment. Their rights in general operate within the framework of the rights of others to determine their best interests and legislation that can take away individual privacy rights. They are being denied a voice in education that exists in other legal frameworks and which as young citizens and developing responsible learners and adults they should have.

If we are to promote effective learning, appropriate assessment and active citizenship, and to maintain fidelity to the *Convention on the Rights of the Child* which Australia has endorsed and the individual rights bestowed by the Constitution and legislation in the U.S., three developments for educational assessment should be implemented for the future.

1. Students should be engaged as active voices in curriculum and assessment matters and as key partners in policy developments that will require their support to succeed.
2. Students’ voice and authority should be respected in making decisions about their personal engagement in assessment, particularly matters related to forms as advocated by the Australian *Disability Standards*. Rights do not come without responsibilities, and a voice heard is not necessarily a voice acted upon. However, all students should be engaged in decisions that affect their capacity to learn and to demonstrate their achievement.
3. The privacy of outcomes of student assessments should be respected and student consent should be obtained. Further the impact of assessment and accountability regimes on student emotional well-being, self-esteem and reputation cannot be ignored.

While student rights may currently be limited, educators and authorities do not have the right to destroy young people’s lives through policy, no matter how well-intentioned. No other area of education has the capacity to determine a child’s future and future well-being as the assessment practices and outcomes that occur during schooling. If students are not given a voice in educational assessment matters they may just exercise their rights in ways that are in no one’s best interests, and certainly not the interests of governments exercised by

international comparative performance.

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