Linguistic Rights in Education under Australian Law (2005)

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1. Introduction

This paper examines rights to linguistic education under Australian law. The *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)* does not apply in Australia[1] so this cannot be a direct source of rights, but do other conventions or domestic laws assist in establishing a right to mother tongue education in Australia, and do these apply in Australia? This paper will provide general background on language education in Australia and includes a discussion on Indigenous languages and the law.

2. Indigenous Languages in Australia

Upon colonisation in 1788, the British were to find many Indigenous nations and peoples speaking an estimated 250 languages many with 2 or more dialects.[2] It has been estimated that there are now only 64 Indigenous languages spoken in Australia[3] reflecting assimilationist policies up until the 1970s. Erebus describes the destruction of Aboriginal languages: "At the time of European colonisation, there were about 250 distinct Aboriginal languages and around 500 language varieties used across Australia. In little more than 200 years, 150 Australian Indigenous languages have been all but destroyed. While many Aboriginal languages continue to survive, all but a few are under threat. Most have fewer speakers than ever before. Language diversity and multilingualism are declining. Today, only about 20 are still transmitted from one generation to the next, naturally, as first languages of communication. It is estimated that about 50,000 people speak an Australian Indigenous language as their first language."[4]

These languages are and were very diverse, with a range of styles. Very few of these languages now number more than a 1000 speakers.[5] De Varennes suggests that this makes it difficult for a state to guarantee access to education at all levels in the context of Article 15 of the draft *UN Declaration of the Rights of Indigenous Peoples*. This Article would require states to provide education access for Indigenous people in their own culture and language and appropriate resources.[6]

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[1] Though there may be an indirect effect through the United Kingdom courts because English common law is of high precedential value provided no contrary legislation or court decisions are apparent. See further the Australian decisions *R v England* [2004] SASC 254 (26 August 2004); *Giller v Procopets* [2004] VSC 113 (7 April 2004); *R v Goldman* [2004] VSC 165 (3 March 2004); *Regina v Ngo* [2003] NSWCCA 82 (3 April 2003); *Theophanous v The Herald And Weekly Times Limited And Another* [1994] HCA 46; (1994) 182 CLR 104; *The Attorney-General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission* [2003] FamCA 94 (21 February 2003)

[2] McKay, G. (1966), *The Land Still Speaks: Review of Aboriginal and Torres Strait Islander Language Maintenance and Development Needs and Activities Commissioned Report No. 44*, National Board of Employment, Education and Training, Australian Government Publishing Service, Canberra, at 3

[3] Erebus Consulting Partners (December 2002), *Review of the Commonwealth Languages Other Than English Programme: A Report to the Commonwealth,* Department of Education Science and Training, Canberra, at 7.

[4] Erebus Consulting Partners (December 2002), *Review of the Commonwealth Languages Other Than English Programme: A Report to the Commonwealth,* Department of Education Science and Training, Canberra, at 111. (footnotes removed)

[5] McKay, G. (1966), *The Land Still Speaks: Review of Aboriginal and Torres Strait Islander Language Maintenance and Development Needs and Activities Commissioned Report No. 44*, National Board of Employment, Education and Training, Australian Government Publishing Service, Canberra, at 5.

[6] de Varennes, F. (1995), "Indigenous Peoples and Language" 2 *Murdoch University Electronic Journal of Law.*

The complexity and sophistication of Indigenous languages is noted in an example provided by Auld: "As a minority Indigenous language group, members of the Kunibídji community use Ndjébbana as their preferred language of communication. Nearly all Kunibídji community members live in Maningrida, a remote community in Arnhem Land in the Northern Territory. Members of the Kunibídji community are the traditional landowners of the lands and seas directly around Maningrida. Maningrida was developed as a trading post rather than a mission, therefore, the linguistic diversity in Maningrida is unique. Other languages that are spoken in Maningrida include Burarra, Gun-nartpa, eastern Kunwinjku, Rembarranga, Nakarra, Gorrgone, Kunbarlang, Dalabon, Djinang, Wurlaki. English is often spoken as a third or fourth language by Kunibídji. In per capita terms, Maningrida may be the most multilingual community in the world."[7]

Conscious of such issues, the Commonwealth Government in the early 1970s funded the establishment of bilingual programmes in schools in the Northern Territory. Claiming poor standards the bilingual program was controversially abandoned by the Northern Territory government in 1998, though Nicholls notes the lack of available hard data supporting this claim and suggests it was a cost cutting exercise.[8] The decision was criticised by the Aboriginal and Torres Strait Islander Commission (ASTIC) to the United Nations Committee on Economic, Social and Cultural Rights as one which would "impact adversely on Indigenous Peoples."[9] ASTIC also saw it as "a denial of the right of Aboriginal people to equitable educational services and an attack on Aboriginal cultures." [10]

Citing the sad history of Australia's relationship with its Indigenous peoples including, at times, the forbidding of children using their language and the forced removal of children from their parents, known in Australia as the *Stolen Generation*, Nicholls sees the removal of the bilingual program as an abuse of human rights.[11]

Noting that the bilingual approach was not without its difficulties, Hoogenraad reports that because of Warlpiri community support in the Central Australian part of the Northern Territory a bilingual approach has survived as "two way education": "The old Bilingual schools had some precedent, but not much. The models of Bilingual education they had worked under emphasised the learning of initial literacy in the vernacular and initial instruction in the vernacular, then transferring to English: the so-called Transfer model. And even initial literacy and instruction in the vernacular were often not attained in practice." "Aboriginal teaching staff had always understood Bilingual to mean Two-Way, with the children learning both ways, local Aboriginal and English language and knowledge across the curriculum. They understood that education was not just about literacy and language development. They understood that children develop their language – and literacy – skills through learning about their world and their culture. And

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[7] Glenn, A. (2005), *A Middle Approach to Literacy in a Minority Indigenous Australian Language Context.* http://www.aare.edu.au/04pap/ (aul0467.pdf date accessed 1 August, 2005)

[8] Nicholls, C., *The Closure of the Bilingual Programs in Australia's Northern Territory. What is at Stake? A Former School Principal's Perspective* http://www.icponline.org/feature_articles/f18_01.htm
(date accessed 5 August, 2005)

[9] McConvell, P. and Thieberger, N. (2001), *State of Indigenous Languages in Australia – 2001*, Australian State of the Environment Technical Paper Series (Natural and Cultural Heritage), Series 2, Department of the Environment and Heritage.

[10] ATSIC (May 1999), *Submission to the Review into Aboriginal Education in the Northern Territory*, http://www.atsic.gov.au/issues/education/Reviews_Submissions/default.asp (Date accessed 5 August 2005)

[11] Nicholls, C., *The Closure of the Bilingual Programs in Australia's Northern Territory. What is at Stake? A Former School Principal's Perspective* http://www.icponline.org/feature_articles/f18_01.htm
(date accessed 5 August, 2005)

sometimes they managed to teach in this way, but there was no curriculum in place to ensure that this was achieved systematically."[12]

Hoogenraad stresses the importance for such Two Way language success of a regionally organised Indigenous Language and Culture Curriculum and training programs aimed at local Aboriginal people.

In other states some bilingual programmes have operated from time to time, including in the Kimberley in Western Australia, and in Aurakun in Queensland.[13] One issue that arises in such programmes is the wider problem of having culturally appropriate qualified teachers. Thus, in the Pitjantjatjara region of South Australia, schools stopped bilingual programmes at the request of the Indigenous community because they did not want non Pitjantjatjara people teaching Pitjantjatjara. An Australian Parliamentary Committee found: "This opposition to bilingual education is not an isolated case. Some other areas with strong traditional language have expressed opposition to bilingual education. Parents want the best Western education for their children and for traditional language matters to be kept separate."[14]

Amery reports that a national initiative, the *Australian Indigenous Languages Framework,* has allowed the development of a truly innovative curriculum and the teaching of a number of accredited programmes at secondary level, but again the success of the programme has been limited by insufficient resources and teachers.[15] Furthermore, criticism has been levelled at the educational authorities for not informing Indigenous communities of Commonwealth language funding because the "overwhelming priority set by the States has been to give priority to support for Asian and European languages, with little attempt made to even inform Aboriginal and Torres Strait Islander people of the availability of such funds."[16]

In short, Australia has a very sad record regarding Indigenous language support.

3. Non Indigenous Languages in Australia

Wave after wave of migration has brought many additional cultures and languages to Australia. English is the dominant language and this not only reflects the importance of English, Irish and Scottish migration but also deliberate language policies based upon assimilation,[17] and immigration policies designed to exclude Asians in preference to Europeans. These included the infamous *White Australia Policy* containing, *inter alia,* language tests that could be administered by immigration officials in any language. The dominance of Cantonese, Mandarin and Vietnamese languages in the Tables below indicates that modern Australia has rejected that policy and has embraced Asia.

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[12] Hoogenraad, R. (2002), *Language and Cutural Programs in New South Wale*s: *the View from Central Australia*. http://www.boardofstudies.nsw.edu.au/aboriginal_research/pdf_doc/lang_cult_nsw_hoogenraad.doc (date accessed 5 August, 2005)

[13] Erebus Consulting Partners (December 2002), *Review of the Commonwealth Languages Other Than English Programme: A Report to the Commonwealth,* Department of Education Science and Training, Canberra, at 116.

[14] Australian Parliamentary Committee (1991), *Language and Culture A Matter of Survival- Report of the Inquiry into Aboriginal and Torres Strait Islander Language Maintenance, Australian Parliament*.

[15] Rod Amery *Indigenous Language Programs In South Australian Schools: Issues, Dilemmas and Solutions*, 2002 www.board ofstudies.nsw.edu.au/aboriginal_research/pdf_doc/indig_lang_sa_amery.doc
(date accessed 12 August, 2005)

[16] Erebus Consulting Partners (December 2002), *Review of the Commonwealth Languages Other Than English Programme: A Report to the Commonwealth,* Department of Education Science and Training, Canberra, at 128

[17] Erebus Consulting Partners (December 2002), *Review of the Commonwealth Languages Other Than English Programme: A Report to the Commonwealth,* Department of Education Science and Training, Canberra, at viii.

Table 1 provides an idea of languages in modern Australia, the number of language speakers and the variety of languages spoken.

Table 1: Top 20 Community Languages in Australia in 2001 & 1996 [18]

Language	2001	1996
Italian	353,606	375,834
Greek	263,718	269,831
Cantonese	225,307	202,194
Arabic (incl. Lebanese)	209,371	177,641
Vietnamese	174,236	146,192
Mandarin	139,288	92,065
Spanish	93,595	91,270
Tagalog (Filipino)	78,879	70,343
German	76,444	99,050
Macedonian	71,994	71,414
Croatian	69,850	69,152
Polish	59,056	62,774
Turkish	50,692	46,169
Serbian	49,202	37,238
Hindi	47,817	33,988
Maltese	41,392	45,179
Dutch	40,187	40,686
French	39,643	39,392
Korean	39,528	29,930
Indonesian	38,724	27,195

Table 2 examines enrolment in Languages other than English in year 12, the final year of secondary schooling in Australian schools.

Table 2: Year 12 enrolments in tertiary-accredited LOTE, by languages, all schools, Australia, 1994–2000 (per cent)[19]

Language	1994	1995	1996	1997	1998	1999	2000
Japanese	20	21	22	21	22	22	22
French	17	18	17	16	17	17	17
German	10	11	11	11	11	11	11
Chinese	11	10	10	10	10	11	12
Italian	9	9	9	9	8	8	8
Indonesian	5	6	7	8	8	8	9
Greek	7	6	5	5	4	4	4
Vietnamese	5	5	4	4	3	3	3
Spanish	4	3	3	3	3	3	3
Arabic 3	2	2	2	2	2	2	
Other	9	9	10	11	11	12	11
Total	100	100	100	100	100	100	100

It is interesting to compare Table 1 and 2. In the year 2000 none of the top 3 community languages, Italian, Greek and Cantonese, were the three main languages taught, even though there has been significant migration from those countries. However, Chinese and Italian are in the top 5 in both lists. The high number of Japanese enrolments represents national economic

[18] Adapted from Erebus Consulting Partners (December 2002), at 8

[19] Reproduced from Erebus Consulting Partners (December 2002), at x.

policies in the 1990's[20] which had an influence on language teaching in schools, recognising the dominance of Japan as an Australian trading partner. Japanese migration to Australia has been low.

The dominance of French and German languages in schools represents long traditions in Australia favouring those languages and the existence of trained expertise to teach them. This is despite the fact that French is a lowly 17th on the community language list and German 9th. Read together the Tables suggest that express government policy seems to have a larger influence on what languages are taught rather than a desire among immigrants to maintain their mother tongue.

One constraining factor on language education in Australia has been the limited supply of qualified language teachers.[21] In some parts of Australian society there is a rather narrow minded perception that there may not be the urgency to study another language given the emerging dominance of English in international commerce, in aviation, and its official status in organisations such as the OECD, and the United Nations.[22]

On a more positive side it has been noted that:
"Rather, there is an emerging consensus that the key rationale for learning a language other than English is to acquire and develop knowledge and skills for intercultural understanding and engagement. This consensus incorporates the belief that learning for the fullest possible economic, cultural and social participation should enable people to have greater understanding of and engagement with the wider global community and the many societies and cultures that constitute it."[23]

Despite these aspirations, Australian language instruction ranks well behind many other countries. At 40 hours per year devoted to foreign language instruction for 9 – 14 year olds the Australian hours per year are only half those of England, a quarter of Belgium and Greece, and one third of Japan.[24]

4. A special multicultural group: Language rights of children in detention

Australia has a policy of mandatory detention of people unlawfully entering Australia, and until very recently a significant number of those detained were children.[25] The Australian Human Rights and Equal Opportunity Commission (HREOC) has made a number of findings in its *Report of the National Inquiry into Children in Immigration Detention*.

In relation to language, the Report found that children have not been denied the right to use their language, nor did it find any breaches of the *Convention on the Rights of the Child*, nevertheless there were "no measures in place to actively facilitate the maintenance and development of this language". There was no access to written materials or language schools, and this was a particular problem for unaccompanied children and children from minority languages.[26]

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[20] Erebus Consulting Partners (December 2002), at ix.
[21] Erebus Consulting Partners (December 2002), at xiv, and xvii.
[22] Erebus Consulting Partners (December 2002), at xix.
[23] Erebus Consulting Partners (December 2002), at xxi.
[24] Erebus Consulting Partners (December 2002), at 18 citing OECD *Education at a Glance*, Paris, 2002, Chart D1
[25] 2,184 children were held in detention between 1999 and 2003
[26] Australian Human Rights and Equal Opportunity Commission (2004), *A Last Resort: The Report of the National Inquiry into Children in Immigration Detention*, at 788

Classes were conducted in English, not in the mother tongue. There was some use of detainees as teachers aides though this was "not applied as a uniform policy".[27]

On non language matters HREOC found multiple breaches of the Convention especially of Articles 2 and 28.[28] Immigration detention laws were "fundamentally inconsistent with the *Convention on the Rights of the Child*"[29] not only placing them at "high risk of serious mental harm",[30] but also finding that they "were not in a position to enjoy….the right to an appropriate education on the basis of equal opportunity."[31]

5. The law on linguistic rights in Australia

Australia is party to a number of international conventions of relevance to a right to linguistic education:

- *United Nations Universal Declaration of Human Rights (1948)*
- *UNESCO Convention against Discrimination in Education (1962);*
- *International Convention on the Elimination of All Forms of Racial Discrimination (1965);*
- *International Covenant on Civil and Political Rights (1966);*
- *International Covenant on Economic, Social and Cultural Rights (1966);*
- *Convention on the Rights of the Child (1989);*

Under Australian law a convention has to be given force in domestic law by Act of Parliament before it has direct effect.[32] The executive government has the power to enter into treaties, but only parliament has the power to transform the treaty into domestic law. Accordingly the above treaties have not been incorporated into Australian law merely by their ratification or accession.[33]

Have they been incorporated by statute?
The *Racial Discrimination Act* 1975 (Cth) adopts the *International Convention on the Elimination of All Forms of Racial Discrimination* into domestic law and includes the Convention in a Schedule. The Convention makes reference to the *Convention against Discrimination in Education* and to the *United Nations Universal Declaration of Human Rights* in its preamble.

The *Convention on the Rights of the Child (CoRC)* and the *International Covenant on Civil and Political Rights* are included in a Schedule to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). This does not technically implement the Conventions in Australian law though it does assist in the defining of human rights and makes these international instruments the subject of the functions of the Human Rights and Equal Opportunity Commission. Breaches of the Convention can be notified to the Commission.[34]

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[27] Australian Human Rights and Equal Opportunity Commission, at 788
[28] Australian Human Rights and Equal Opportunity Commission
[29] Australian Human Rights and Equal Opportunity Commission, at 849
[30] Australian Human Rights and Equal Opportunity Commission, at 850
[31] Australian Human Rights and Equal Opportunity Commission, at 850
[32] Kirby J in *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20 (29 April 2004) at para 171 and Callinan J at para 220
[33] Cranwell, G (2001), "Treaties and Australian Law- Administrative Discretions, Statutes and the Common Law", *QUTLJ,* 49.
[34] *"X" v Minister for Immigration & Multicultural Affairs* [1999] FCA 995 (23 July 1999) `per North J at para 42

A ratified treaty has influence on Australian domestic law, even when not enacted in domestic law. It has been held that a minister of state, and those acting under his or her authority, is required to pay some attention to such treaties when exercising a discretion: *Minister for Immigration and Ethnic Affairs v Teoh*·.[35] Furthermore treaties and customary international law may impact on the common law of Australia [36] though the extent to which decisions of courts such as the European Court of Human Rights will be persuasive on Australian courts in the future is not determined.[37]

Australia is a federation and school education is controlled at the State and Territory level. An analysis in Australia of linguistic rights in education requires an examination of a number of State and Territory Acts. These do not reveal any legal right to be instructed in a language other than English or any legal obligation on the state to do so.[38] Linguistic rights are not addressed in these statutes, the closest is the *Education Act 1990* (NSW) which requires every person concerned in the education of children of school-age to have regard (as far as is practicable or appropriate) to provision of an education for Aboriginal children and for children from non-English speaking backgrounds that has regard to their special needs: s 6. GRACIENNE A sentence HAS BEEN DELETED HERE

Accordingly it is not possible in Australia to point to express statutory linguistic rights though certain aspects of rights contained in the above conventions have been enacted.[39] Would these ground a cause of action in Australia? The most likely remedy would be sought under the *Racial Discrimination Act*, relying on the *International Convention on the Elimination of All Forms of Racial Discrimination*. The argument would run that failure to provide language instruction and indeed education in the mother tongue generally would breach sections 9 or 10 because they failed to provide equality before the law, when compared to Australians whose mother tongue was English. If this argument was followed to its logical conclusion governments would be obliged to provide bilingual instruction to all ethnic minorities. This argument is unlikely to succeed:

(i) The Act refers to the *International Convention on the Elimination of All Forms of Racial Discrimination* for assistance in interpretation of rights as used in the section. That convention does not expressly guarantee the linguistic rights described above.
Relevant parts of sections 9 and 10 of the *Racial Discrimination Act* provide: "Section 9(1): It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life…. (2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention. Section 10(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or

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[35] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, though see *Lam* v *Minister for Immigration and Ethnic Affairs* [2003] HCA 608 and Charlesworth, H., Chiam, M., Hovell, D. and Williams, G. (2003), "Deep Anxieties: Australia and the International Legal Order", 25 *SydLRev* 423, at 450

[36] Cranwell, G (2001), "Treaties and Australian Law- Administrative Discretions, Statutes and the Common Law", 1 *QUTLJJ* 49, at 52. Charlesworth, H., Chiam, M., Hovell, D. and Williams, G. (2003), "Deep Anxieties: Australia and the International Legal Order", 25 *SydLRev* 423, at 452

[37] Cranwell, G (2001), "Treaties and Australian Law- Administrative Discretions, Statutes and the Common Law", *QUTLJ,* 49, at 59 – 61

[38] Education Act 1972 (SA), Education (General Provisions) Act 2006 (Qld); Education and Training Reform Act 2006 (Vic); School Education Act 1999 (WA); Education Act 2004 (ACT); Education Act 2003 (NT); Education Act 1994 (Tas); Education Act 1990 (NSW)

[39] Human Rights and Equal Opportunity Commission (2000), *Education Access: National Inquiry into Rural and Remote Education,* at 10.

national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin."

(2) One difficulty in s 9 is the requirement for an "act". The absence of or failure to provide bilingual education is unlikely to be construed as such an act. Section 10(2) refers to the definitions in Article 5 of the *Convention*. These include a right to *education and training* and to a *right to equal participation in cultural activities*. For reasons discussed below, an Australian, or indeed an international court, is unlikely to extend these terms to include a right to bilingual education.

(ii) The introduction of a full program of bilingual education in schools and educational providers at all levels in Australia across the range of ethnic groups in this country would be prohibitively expensive. Such a dramatic change in educational practice across the continent would need the clearest language in a statute. Strong evidence of such a principle under international law could assist domestic interpretation but this is not yet proven. The *International Convention on the Elimination of All Forms of Racial Discrimination,* the *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights* do *not* provide express rights of bilingual education. Principle 7 of CoRC provides: "The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society…."

Article 27 of the *International Covenant on Civil and Political Rights* provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

It is large step from requiring education to be provided or not preventing a language to be used to requiring schools to teach bilingually.

In the South African decision *re Gauteng School Education Bill of 1995*[40] Sachs J traces the history of Article 27. He notes that "Article 27 does not contain any explicit reference to positive measures to which the minority might be entitled. Proposals for including in Article 27 a list of concrete rights such as state supported schools for minorities or language rights, in fact failed."[41] Citing a number of authors strongly supporting minority rights, including special rapporteur Capotorti , Sachs J makes the point that Article 27, even on the authors' strongest arguments is "a framework measure which has implicit in it an incipient or embryonic obligation on the State to pay regard to the needs of cultural, linguistic and religious minorities" which "falls far short of imposing a firm duty on the state to promote the separate development of minorities (as opposed to the duty of preventing discrimination against them, where there is a high level of responsibility)."[42]

This absence of positive rights was also found in the *ECHR* in the Belgian languages case which held that Article 2 did not "safeguard the right of each person to receive an education in

[40] re Gauteng School Education Bill of 1995 (CCT39/95) 1996 (4) BCLR 537; 1996 (3) SA 165; [1996] ZACC 4 (4 April 1996)

[41] re Gauteng School Education Bill of 1995 (CCT39/95) 1996 (4) BCLR 537; 1996 (3) SA 165; [1996] ZACC 4 (4 April 1996), at para 62

[42] re Gauteng School Education Bill of 1995 (CCT39/95) 1996 (4) BCLR 537; 1996 (3) SA 165; [1996] ZACC 4 (4 April 1996), at para 62 at para 65

conformity with his cultural and linguistic preferences".[43]

6. Indigenous languages and bilingualism: A special legal case?

One issue which arises in a multicultural society such as Australia is whether Indigenous languages should have any special place in the fight for adequate linguistic resources. De Varennes convincingly argues that Indigenous languages around the world should, suggesting that international law and domestic law are moving towards increased recognition of their "special position": "They are not simply another minority group, but would seem to deserve greater latitude, and also greater assistance, in the maintenance of their traditional customs, practices and languages than their demographic strength would normally warrant when applying the right to non-discrimination or the right to use their languages with other members of their communities. There is a visible trend at both levels signalling the unique relationship between a state and its indigenous peoples which would appear to require concrete government measures allowing the continued use of these languages, and even correcting the results of previous assimilationist practices by public authorities. At the very least, it would appear that a state has the obligation to provide the resources for the use of indigenous languages as medium of instruction in education…."[44]

A joint Australian parliamentary report has highlighted the disadvantage under which Australian Aboriginal children operate generally in the education system: "Concern was expressed that some Aboriginal children do not have access to education beyond primary school level and services for children with specific difficulties or disabilities are inadequate. Eleven per cent of Aboriginal and Torres Strait Islander children aged 15 years and over have never been to school. An Indigenous child has only a 17 per cent chance of completing school to year 12, compared with a 70 per cent chance for other children. In addition, an indigenous child has a one in eight chance of going to school between the ages of 5 and 9."[45]

HREOC has commented on other discriminatory features about Indigenous education especially in remote areas, including a lack of schools, teachers or tutors to supervise distance education and insufficient secondary schooling. Most importantly for our present discussion, HREOC commented on the access issues surrounding Indigenous children "whose only curriculum is in a language which they have never heard spoken at home – English." [46] HREOC provided some useful statistics on Indigenous languages in Australia. In the Northern Territory 61% of the Indigenous population speak an Indigenous language at home. In *rural* areas of Western Australia and South Australia it is 51% and 20% respectively. In Queensland it is 15% of Indigenous *households*. In New South Wales, Victoria and Tasmania the percentages are much lower: less than 1%, 1.1% and 0.2% respectively.[47]

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[43] Case "Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium" v Belgium [1967] ECHR 1; (1474/62) (9 February 1967)

[44] de Varennes, F. (1995), *Indigenous Peoples and Language*, 2 Murdoch University Electronic Journal of Law, see also de Varennes, F. (1995), *To Speak or not to Speak, The Rights of Persons Belonging to Linguistic Minorities* http://www.unesco.org/most/ln2pol3.htm, date accessed 12 August, 2005 where the author lists many examples of states enshrining linguistic rights in domestic legislation. He cites a number of treaties and international instruments, such as the *Declaration on the Rights of Persons belonging to National, or Ethnic, Religious and Linguistic Minorities* which do contain an entitlement to education in a minority language. He notes however that even that Declaration is "surprisingly timid in its wording" because a state might maintain they are meeting the obligation by just allowing the teaching of a minority language (at footnote 40).

[45] Parliament of Australia Joint Standing Committee on Treaties (August 1998), *United Nations Convention on the Rights of the Child - 17th Report*, Commonwealth of Australia, at para 7.290.

[46] Human Rights and Equal Opportunity Commission(2000), *Education Access: National Inquiry into Rural and Remote Education*, at 10-11.

[47] Human Rights and Equal Opportunity Commission(2000), *Education Access: National Inquiry into Rural and Remote Education*, at 76 - 79

What is the legal position?
There are no cases specifically on Indigenous language rights in Australia. There are two cases on language rights in education which come from an unusual source, and that is disability law. In *Catholic Education Office v Clarke* [48] the Full Federal Court dismissed an appeal brought by the Catholic Education Office against a decision of the lower court which had found that an offer of enrolment to a student with a profound hearing impairment excluding the provision of Auslan (described in another case as "the native language of the deaf community in Australia"[49]) discriminated against the student. In *Hurst and Devlin v Education Queensland*[50] a judge awarded $60,000 because of the failure of the school to offer Auslan to Devlin. On the facts he dismissed the case brought by Hurst. These two cases are significant in that they recognise a linguistic education right in the children. Technically they are of less use in the non disability cases because of significant differences in the wording of the *Disability Discrimination Act* (1992) when compared to the *Racial Discrimination Act,* but they are encouraging and represent movement into new ground.

Racial discrimination has been argued in Australia courts or tribunals in relation to Indigenous peoples and their education.[51] In *Aboriginal Students Support & Parents Awareness Committee Traeger Park Primary School v Minister for Education, Northern Territory of Australia*[52] HREOC did not find discrimination in a case where a decision had been made to close a school and transfer the students to another school in the town. It will be recalled that s 9(1) of the *Racial Discrimination Act* requires an "act". Having found that the closure of the school was an act under s 9(1) Commissioner Carter continued: "….. finally, the sub-section strikes at acts based on race which in effect nullify or impair the exercise or enjoyment of the right. [to education] The human right to education and training is one thing; the form in which the right may be enjoyed or exercised is something different. If the "act" has the effect that the right to education and training is denied or impaired it is unlawful. If the "act" has the effect that the right to an education is recognised and maintained for the person's "enjoyment", but that the form in which the education is provided is different from that in which it was previously provided, that is not prima facie unlawful unless it can be established that the altered form in which the right to education is to be exercised or enjoyed is such as either to effectively nullify or impair the enjoyment or exercise of the right on an equal footing with others."[53]

Accordingly unlawful discrimination was not found because the children could attend another school in the same town.

Following on from this analysis it can be argued that denying an Indigenous child education in their mother tongue when their English skills are poor or not existent is clearly a denial or impairment of education, going not just to form but to substance. The situation is exacerbated for children in remote and rural areas; urban Indigenous children are more likely to have English as their first language and to have access to better language education support. In the former case there may well be evidence of denial or impairment, the element missing in the *Traeger Park Primary School* case. Yet on this occasion where would the evidence be of an *act*? Systemic failure to provide bilingual education is probably insufficient as such an act, and

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[48] Catholic Education Office v Clarke [2004] FCAFC 197

[49] *Hurst and Devlin v Education Queensland* [2005]FCA 405 at para 125, and see especially paras 728 - 760

[50] *Hurst and Devlin v Education Queensland* [2005]FCA 405 at para 125, and see especially paras 728 - 760

[51] See *Carson & Ors v The Minister of Education* (Qld) & Ors [1989] HREOCA 4 (2 June 1989) and *Aboriginal Students Support & Parents Awareness Committee Traeger Park Primary School v Minister for Education*, Northern Territory of Australia [1992] HREOCA 4 (26 February 1992)

[52] *Aboriginal Students Support & Parents Awareness Committee Traeger Park Primary School v Minister for Education*, Northern Territory of Australia [1992] HREOCA 4 (26 February 1992)

[53] *Aboriginal Students Support & Parents Awareness Committee Traeger Park Primary School v Minister for Education*, Northern Territory of Australia [1992] HREOCA 4 (26 February 1992), at 11

support from international law is not yet forthcoming. In summary, the element present in *Traeger*, the *act*, is missing and the element absent in that case, the *impairment* may be present. In either case the Indigenous community will not prevail.

The outcome could well be the different where a government moves to remove bilingual program, just as the Northern Territory did in 1998. In such a case there was a specific and identifiable act. Unfortunately this was not tested in the courts at the time.

7. Conclusions

Re Indigenous people
Conventions which expressly or impliedly create Indigenous bilingual rights have not been ratified by Australia or have not yet entered into international law. For example, Article 15 of the United Nation's *Draft Declaration on the Rights of Indigenous Peoples* provides: "Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. Indigenous children living outside their communities have the right to be provided access to education in their own culture and language. States shall take effective measures to provide appropriate resources for these purposes."

There remains the likelihood that Indigenous language rights may become stronger under customary international law. Recognising this possibility and the emerging conventions, Australian State and Federal Governments should take the initiative and revisit their policies on Indigenous languages to ensure that cultural rights are protected and languages allowed to grow. The loss of such languages is not a matter Australians can be proud of.

If Australian governments move to treat Indigenous languages separately (and like de Varennes this author argues that they should) amendments *do not* need to be made to the *Racial Discrimination Act* to avoid a possibility that differential treatment in favour of Aboriginal and Torres Strait Islander peoples could breach s 10. This is because such special treatment would fall within the exception in s 8(1) of the Act which in turn applies the special measures provisions in Article 1, paragraph 4 of the Convention. Special measures are contemplated in other legislation, for example, the New South Wales *Education Act* makes provision for children with special needs, including Aboriginal children: s 20.

It is submitted that the Australian Federal Government should examine the rights proposed in the draft UN Convention very carefully and give effect to them via amendment to the *Racial Discrimination Act*, to remedy previous injustices visited on our Australian Indigenous peoples. Australians should note the recommendations of HREOC in this regard which were designed to "dismantle language and cultural barriers in education for Indigenous students". These recommendations included funding for expanded language education, and training of Indigenous teachers and workers who are critical to the success of language programs; the accreditation of Indigenous languages as part of the Australian LOTE (Languages other than English) program; and the funding of Indigenous organisations to teach, preserve and promote language. HREOC saw a number of fundamental principles behind this:
• self determination;
• the right of Indigenous children to an education in relation to their culture, language and history and which prepares them for participation in wider Australian society, and
• the right of Indigenous people to transmit their culture, language and history.[54]

[54] Human Rights and Equal Opportunity Commission (2000), *Education Access: National Inquiry into Rural and Remote Education.*

Re non Indigenous peoples

In relation to non Indigenous peoples the Australian government proudly boasts on its website that it is providing $110 million from 2005 - 2008 to support teaching and learning in languages. This is part of the *National Statement and Plan on Languages Development in Australian Schools 2005 – 2008*. It is hoped that these efforts are a more successful than our past, or we will continue to lag well behind Europe in language education in Australia.