

# Aotearoa New Zealand: Language Rights in Education (2005)

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## 1. Background

### The importance of language in nation building in Aotearoa New Zealand<sup>1</sup>

*... The language is the core of our Maori culture and mana. Ko te reo te mauri te mana Maori (The language is the life force of the mana Maori). If the language dies, as some predict, what do we have left to us? Then, I ask our own people who are we? ... 'Language', according to Oliver Wendell Holmes, 'is a solemn thing, it grows out of life, out of its agonies and its ecstasies, its wants and its weariness. Every language is a temple in which the soul of those who speak it are enshrined.' Therefore the taonga, our Maori language, as far as our people are concerned, is the very soul of the Maori people. What does it profit a man to gain the whole world but suffer the loss of his own soul? What profit to the Maori if we lose our language and lose our soul? Even if we gain the world.<sup>2</sup>*

Maori are the indigenous peoples of Aotearoa New Zealand. The late eighteenth century saw the colonization of New Zealand by European, largely British, settlers. From that time until the latter part of the twentieth century New Zealand society was comprised of largely Maori, those of British descent, and Pasifika<sup>3</sup> peoples, with smaller minorities of settlers from other countries, such as China and the Netherlands. In the last decades New Zealand has seen a significant increase in immigration, particularly from China, the Middle East and European countries and the population now comprises a vast number of different cultures, nationalities, and language and ethnic groups. In the context of language and culture, there have been two significant developments.

First, the latter part of the twentieth century saw a much wider recognition of the importance of Maori language and culture to Maori people and to New Zealand's identity. There was an accompanying renaissance of the Maori language. There are many factors credited for this rebirth with the most significant contributing factor being the rapid and highly successful emergence of Maori-medium education.<sup>4</sup>

Secondly, and over roughly the same period, there has been an increasing focus on the vastly divergent minority groups now in New Zealand, and their argument for greater public recognition and representation of their ethnic, cultural and linguistic identities.<sup>5</sup>

It is argued that while it is important to celebrate New Zealand's new cultural diversity, the danger is that it may cause us to lose sight of the foremost place of the cultural and language rights of Maori as the indigenous people of New Zealand. The view which is held by many is that to advance a case for the language rights of all minority groups is to disadvantage Maori in two ways:<sup>6</sup> "It denies Maori

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<sup>1</sup> Aotearoa (land of the long white cloud) is the indigenous Maori name for New Zealand. The use of both names together recognizes the bicultural nature of New Zealand and is now common usage.

<sup>2</sup> (1986) Evidence of Sir James Henare to the Waitangi Tribunal on the *Te Reo Maori Claim, Report of the Waitangi Tribunal on the Te Reo Maori Claim (Wai 11)*, Government Printer, Wellington, New Zealand, at p 51.

<sup>3</sup> From Pacific islands predominantly Samoa, Tonga, Fiji and Niue.

<sup>4</sup> May, S. (2005), 'Bilingual/immersion education in Aotearoa/New Zealand: setting the context' (with Richard Hill) *International Journal of Bilingual Education and Bilingualism* 8, 5, pp 377-403.

<sup>5</sup> May, S. (2002), 'Accommodating multiculturalism and biculturalism in Aotearoa/New Zealand: implications for language education' *Waikato Journal of Education*, 8, pp 5-26, at p 6.

<sup>6</sup> Benton, R. (1988), 'The Maori Language in New Zealand Education', *Language, Culture and Curriculum*, 1 pp 75-83, quoted in May, S. (2005), 'Bilingual/Immersion Education in New Zealand: setting the context' (with Richard Hill) *International Journal of Bilingual Education and Bilingualism* 8, 5, pp 377-403.

people their equality as members of one among two (sets of) peoples, and it also tends to deny the divisions of Maoridom their separate status while exaggerating the status of other immigrant groups. In the end, Maori interests become peripheral, combined with other ‘special problem’ areas.”

Biculturalism recognizes the special and equal status of Maori culture and language as promised by the Treaty of Waitangi.

The current debate therefore centres on the reconciliation of biculturalism and bilingualism and multiculturalism and multilingualism in education, and in society generally, in the New Zealand of today.

### **The Treaty of Waitangi/*Te Tiriti o Waitangi* and the right to language**

In 1840 the Treaty of Waitangi (*Te Tiriti O Waitangi*) was signed between approximately 512 Maori chiefs and William Hobson as representative of the British Crown. The Treaty is now commonly regarded as the founding constitutional document of New Zealand.<sup>7</sup> This has not always been the case however and a body of Treaty jurisprudence is constantly developing. Essentially the Treaty attempted to formalize the rights and responsibilities of the Crown and British colonizers and the Maori people. It set out three Articles. By the First Article, Maori chiefs ceded sovereignty over New Zealand to the British Crown thus giving the Crown the authority to govern and making New Zealand a part of the British Empire.<sup>8</sup>

The Second Article guaranteed the Maori chiefs and tribes and individuals of New Zealand: ‘... the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties [taonga which may be translated as ‘valued possessions or treasures] which they may collectively or individually possess ...’.<sup>9</sup> By the Third Article the Queen extended to the ‘Natives of New Zealand’ the protection of the Crown and imparted to them the rights and privileges of British citizens. The Human Rights Commission in its New Zealand Action Plan for Human Rights *Mana ki te Tangata* describes the two elements of the Treaty as first, the right to live as citizens of *Aotearoa* New Zealand under one law, and secondly, the affirmation for Maori of the right to live as Maori with the protection and development of those things treasured by Maori. *Turangawaewae*, or the right of all peoples to belong, binds these two elements together.<sup>10</sup> For Maori people, the preservation and promotion of the Maori language is essential to this belonging.

The Treaty was drafted in both Maori and English and discrepancies in the wording between the two languages has been at the root of many of the allegations of injustices which have arisen. Conflict has been concentrated largely in two areas. One is with the concept and definition of ‘sovereignty’ in the First Article. The second area of conflict relates to alleged breaches by the Crown of Article Two in respect of land and *taonga*. Such an allegation was that the Maori language (*te reo*) was *taonga* which had not been accorded ‘exclusive and undisturbed possession’ as the Crown had guaranteed in Article Two. The decision of the Waitangi Tribunal in this matter is central to a discussion of the recognition of the Maori right to language and is discussed below.

### **The Maori Language [*Te Reo*] — its decline and near-extinction**

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<sup>7</sup> McHugh, P. *The Maori Magna Carta*, Oxford University Press, Auckland.

<sup>8</sup> Much of the controversy relates to the use of the word ‘*kawanatanga*’ in the Maori version which has the much more limited meaning of governorship rather than sovereignty. It is contended that this was the intention of the Maori chiefs, believing that they would maintain their sovereignty and ‘*rangitiratanga*’ or chieftanship under the protection of Queen Victoria.

<sup>9</sup> The Maori version states that chiefs, tribes, families and individuals would maintain: ‘the full chieftanship [*rangitaritanga*] of their lands their homes and all their treasured things’.

<sup>10</sup> The Human Rights Commission (2004), *Human Rights in New Zealand Today Te Kahui Tika Tangata*, Wellington, New Zealand.

It is important to outline the history of the Maori language within the development of New Zealand as an independent nation. The Maori language, intersected with New Zealand's national identity, has travelled along two pathways. The first is the transition of the language from being a spoken-only language to its having a written form. This early development is credited largely to the work of missionaries and early settlers. The second path is the decline of the language to its almost extinction at the middle of the 20<sup>th</sup> century and then its renaissance at the end of that century which continues today.

In 1800 the Maori language was the predominant language spoken in Aotearoa New Zealand. However, despite a script of carving signs, the Maori language was essentially spoken-only and there was no written communication through language. With the arrival of English-speaking missionaries and settlers early in the 19<sup>th</sup> century came the first attempts, generally by missionaries, to commit the language to written form. Maori enthusiastically embraced the concept of written language although history records that this was generally in the form of their learning to read, write and speak in the English, not Maori language. Seemingly this was despite the fact that it was reasonably common for government officials who were representatives of the British Crown, missionaries and Pakeha<sup>11</sup> (white anglo-saxon) settlers to speak in the Maori language. There was much interaction between Maori and Pakeha on all levels and as Pakeha children grew up with Maori children they were among the first fluent European speakers of the Maori language. However, evidence shows that 'there was a widespread perception that the English language was the language of economic advancement and access to a higher standard of living.'<sup>12</sup> This is an argument which is still widely used today by opponents of majority language rights, that it is vital for speakers of minority languages to learn the majority language in order to have greater economic and social mobility.<sup>13</sup>

At the time of the Treaty, Maori outnumbered Europeans in New Zealand by 100 to 1 but by the second half of the 19<sup>th</sup> century, Pakeha had come to comprise the majority of the population of New Zealand. This change was due largely to the fact that large numbers of Europeans had migrated to New Zealand, and that the Maori population had been severely reduced by sickness and disease introduced by these settlers.

A school system based on that of England was introduced and tuition was solely in the English language. While Maori was still spoken predominantly within Maori families and on marae<sup>14</sup>, Maori parents encouraged their children to learn to speak English fluently. It was perceived to be important for them to succeed in the 'new world'.<sup>15</sup> There is evidence that at the end of the 19<sup>th</sup> century, Maori children were forbidden to speak Maori at school, and were punished for doing so.<sup>16</sup> The rapid urbanization of Maori, and the resultant decline in largely Maori-speaking rural communities following the Second World War, were also significant factors in the decline, and almost extinction, of the Maori language. However, it is generally accepted that the school system which was "English-language only" was the single largest contributing factor to the decline in use of the Maori language.

Evidence placed before the Waitangi Tribunal in its hearing of the Te Reo Maori Claim<sup>17</sup> showed that in 1913 90 per cent of Maori schoolchildren could speak Maori. In 1953, this percentage had dropped to 26 per cent, and in 1975 less than 5 per cent of Maori schoolchildren could speak their native tongue. In 1986 the results of surveys carried out by the Maori Unit of the Council for Educational

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<sup>11</sup> The Maori term for New Zealanders of European origin.

<sup>12</sup> Maori Language Team, *Te Puni Kokiri/Ministry of Maori Development*, (2004), *Te Reo Maori i te Hapori/ Maori Language in the Community*, at p 13.

<sup>13</sup> For a comprehensive discussion of this and other arguments against minority language rights, see May, S. (2003), 'Rearticulating the Case for Minority Language Rights', *Current Issues in Language Planning*, Vol 4, No 2, pp 95-125.

<sup>14</sup> Maori tribal community meeting areas.

<sup>15</sup> For a comprehensive discussion of this and other arguments against minority language rights, see May, S. (2003), 'Rearticulating the Case for Minority Language Rights', *Current Issues in Language Planning*, Vol 4, No 2, pp 95-125.

<sup>16</sup> Benton, R. (1981), 'The Flight of the Amokura', *New Zealand Council for Educational Research*, Wellington; (1986) *Te Reo Maori Claim*, Waitangi Tribunal.

<sup>17</sup> A major turning point in the revival of the Maori language *Te Reo* (see below).

Research were presented to the Waitangi Tribunal by the Council's acting Director, Dr Richard Benton. He said as follows:<sup>18</sup> "... there were very few communities where Maori was still spoken by nearly everyone, from preschoolers to superannuitants ... There were a handful of places where practically everyone still understood Maori ... but where most young children were more comfortable in English than they were in Maori, and a rather larger group where Maori was still widely used among adults when talking with each other but had ceased to be the main language for the community as a whole ..."

In his view:<sup>19</sup> "... There are many reasons why the language has declined so rapidly over the last two or three decades but the major causes stem from the fact that language is first and foremost a social phenomenon. Languages do not flourish in a social vacuum and they are learned an established most effectively through use in a wide variety of contexts. Social changes in recent New Zealand history have greatly reduced the contexts in which Maori people can use their language: urbanisation, improved communications, industrialisation, consolidation of rural schools and internal migration [particularly Maori moving from rural communities into the cities] have all taken their toll."

Added to those factors could also be racism, or the perception that English culture was superior and a failure to understand that the language was an essential expression of Maori culture and for Maori to maintain pride in their identity.

### **The recognition of the right to protection of the Maori Language by the Waitangi Tribunal – the *Te Reo Maori* Claim**

The Waitangi Tribunal was established pursuant to the *Treaty of Waitangi Act 1975(NZ)* to make recommendations on claims relating to the practical application of the Treaty. In 1986 the Tribunal heard and reported on the *Te Reo Maori* Claim. Essentially, this claim was based on the allegation that the Crown had failed to protect the Maori language and this was a breach of the promise contained in Article Two of the Treaty to protect Maori '*taonga*' or treasures. The recommendations of the Tribunal signified a major turning point in the right to Maori language in general and in education. Its findings recognised Maori culture as part of the heritage of New Zealand and the Maori language as being at the heart of that culture. In its report the Tribunal stated:<sup>20</sup> "The evidence and argument has made it clear to us that by the Treaty the Crown did promise to recognise and protect the language and that that promise has not been kept. The 'guarantee' in the Treaty requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence and certainly not a right to deny its use in any place. It is, after all, the first language of the country, the language of its original inhabitants and the language in which the first signed copy of the Treaty was written. But educational policy over many years and the effect of the media in using almost nothing but English has swamped the Maori language and done it great harm. We have recorded much of what we were told of the effect upon Maori children of our educational policy and it makes dismal reading. It seems that many Maori children leave school uneducated by normal standards, and that disability bedevils their progress for the rest of their lives."

Importantly, the term 'treasures' was taken by the Waitangi Tribunal to include the Maori language *Te Reo*<sup>21</sup> and therefore a guaranteed right to its protection exists under Article Two. Furthermore, in relation to the Crown's obligations contained within the term 'guarantee' the Tribunal embraced the view that this involved affirmative action rather than passive acceptance, that it extended further than<sup>22</sup>

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<sup>18</sup> Waitangi Tribunal (1986) *Report of the Waitangi Tribunal on the Te Reo Maori Claim (Wai 11)*, Government Printer, Wellington, New Zealand.

<sup>19</sup> Waitangi Tribunal (1986) *Report of the Waitangi Tribunal on the Te Reo Maori Claim (Wai 11)*, Government Printer, Wellington, New Zealand.

<sup>20</sup> Waitangi Tribunal (1986), *Report of the Waitangi Tribunal on the Te Reo Maori Claim (Wai 11)*, Government Printer, Wellington, New Zealand, p 11.

<sup>21</sup> *Te Reo Maori Claim (Wai 11)* (1986).

<sup>22</sup> *Te Reo Maori Claim, Wai 11* (1986), at p 29, the Tribunal quoted with approval from the submission made on behalf of the

“... merely leaving Maori people unhindered in their enjoyment of the language and culture. It requires active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture ...

The word guarantee imposes an obligation to take active steps within the power of the guarantor, if it appears that the Maori people do not have or are losing, the full, exclusive and undisturbed possession of the Taonga...”

In the context of education, the Tribunal recommended that the Maori language should be widely taught from an early stage and that instruction in Maori should be available as of right to the children of parents who seek it. In an omission considered by many to be regrettable, the Tribunal stopped short of recommending bilingualism or of making Maori a compulsory language in schools.

As a result of the Tribunal’s recommendations, the *Maori Language Act 1987 (NZ)* declared the Maori language to be ‘an official language of New Zealand’. The Maori Language Commission was established to actively promote Maori as a living language.

In the education context the path towards the revival of the Maori language had already begun in the form of full immersion Maori pre-schools. From 1982 a number of *te kohanga reo*, or Maori language ‘nests’ were established. These were run independently by parents. Full immersion Maori language education has now been incorporated by statute within the state education system<sup>23</sup> as the *kohanga reo* students move upwards through the education system, to state-funded Maori medium primary schools (years 1- 8), *kura kaupapa Maori*, and secondary schools (years 9-13), *wharekura*. There is now also a New Zealand-wide Maori tertiary institution or *wananga*.<sup>24</sup> There has also been a related expansion of predominantly English-speaking state schools which incorporate partial-immersion Maori language programmes.<sup>25</sup>

Statistics published in 2000 by the Ministry of Maori Affairs (*Te Puni Kokiri*) show that, in 1998:<sup>26</sup>

- 87 per cent of Maori children enrolled in pre-school education were learning some Maori language;
- Just over 40 per cent of Maori children were enrolled in *kohanga reo*;
- 36 per cent of Maori students in schools were learning Maori language through immersion or bilingual programmes or as a school subject; and
- 3 per cent of all Maori students in schools were enrolled in *kura kaupapa Maori*

Recent statistics show that the latter number, though still very small is continuing to rise, and in 2003 7.7 per cent of Maori students, or 5,793 students, were enrolled in *kura kaupapa Maori*.<sup>27</sup>

## 2. Language Rights in Compulsory Education – bilingual and multilingual

In a discussion of the tension between bilingualism and multilingualism, the research of Professor Stephen May plays a significant role. Professor May is the Foundation and Chair of Language and Literacy Education at the University of Waikato, and he is at the forefront of research in language and literacy rights. He adopts the differentiation applied in international law between two broad types of minority groups: national minorities as people who have historically been associated with a particular territory including indigenous peoples, and ethnic minorities as peoples who have migrated from their country of origin.<sup>28</sup> In using these definitions Professor May then points to the distinction between

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New Zealand Section of the International Commission of Jurists.

<sup>23</sup> Section 155 of the *Education Act 1989 (NZ)* provides that the Minister may designate a state school *Kura Kaupapa Maori* in which Maori is the principal language of instruction.

<sup>24</sup> See below for a full discussion of *wananga*.

<sup>25</sup> See May, S. (2005), ‘Bilingual/immersion education in Aotearoa/New Zealand: setting the context’ *International Journal of Bilingual Education and Bilingualism* 8, 5, pp 377-403.

<sup>26</sup> Retrieved 15/4/05 from <http://www.tpk.govt.nz/maori/language/education.asp>.

<sup>27</sup> Ministry of Education (March 2003), *Nga Haeata Matauranga Annual Report on Maori Education 2002/2003*, at p 62.

<sup>28</sup> May, S. (2002), ‘Accommodating Multiculturalism and biculturalism in Aotearoa/New Zealand: implications for language education’ *Waikato Journal of Education*, 8, pp 5-26, at p 12.

two types of rights: promotion-oriented rights and tolerance-oriented rights.<sup>29</sup> The former rights entail the positive promotion of the right through state-funded educational support; and the latter means the right to use language and thus preserve one's language within the community, family and such like. In respect of promotion-orientated rights, May asks the question:<sup>30</sup> "Taking the realm of education as an example, promotion-orientated language rights thus raise the inevitable question about what obligation, if any, the state has to promote or foster minority languages within state schools? And if the state does become involved in this, how can it set reasonable limits on who might be eligible for such language education?"

In his view, in the case of national minorities such as indigenous people, the principle is increasingly being adopted worldwide that the state has an obligation to actively promote by providing such language education as of right. It follows then that Maori have a right to expect state language instruction.<sup>31</sup> In the case of ethnic minorities, in May's view, there is an argument for applying the international law criterion of 'where numbers warrant' to the positive promotion of language. If this benchmark were to be applied, significant ethnic minorities would have a reasonable expectation of a positive promotion of language through state-supported educational instruction in their first language.<sup>32</sup>

Thus, in examining language rights in education it is proposed first to consider the promotion-orientated rights of Maori as a national minority. These are largely the right to culture and language, in terms of recognition and state-funding, as are contained in the *Education Act 1989 (NZ)* and the charter provisions in the National Education Framework. In May's suggestion, such rights could be extended to ethnic minorities on a 'where numbers warrant' basis. Secondly, the tolerance-oriented rights, accorded to both national and ethnic minorities, will be considered.

### **Promotion-oriented rights within the *Education Act 1989 (NZ)* and the New Zealand Education Framework**

Schools authorities owe obligations pursuant to the principles of the Treaty and to the extent that the Treaty is incorporated within the *Education Act 1989 (NZ)* and the National Administration Guidelines (NAGS) and the National Educational Guidelines (NEGS).

While not directly enforceable at law the Treaty of Waitangi has become a powerful source of moral rights and obligations. In the context of language this responsibility is reinforced by the report of the Waitangi Tribunal in the *Te Reo Maori Claim*. The educational reforms embodied in the *Education Act 1989 (NZ)* reflect the Crown's awareness of these Treaty obligations in respect of Maori language and culture. There is a strong argument that the recognition of Maori as an official language<sup>33</sup> carries with it a legal obligation to promote the language in all areas of public life, including education. It is not a big stretch to suggest that inadequate allocation of resources for the purpose of bilingual education amounts to a breach by the state of that obligation.

There are a number of provisions in the *Education Act 1989 (NZ)*, the regulations made pursuant to that Act, and in the *National Administration Guidelines (NAGS)* and the *National Educational Guidelines (NEGS)*, which recognize obligations to Maori under the Treaty of Waitangi and a concern for Maori language and culture. Before it formulates its charter,<sup>34</sup> a board of trustees of each state school is required, pursuant to Section 62, to take all reasonable steps to discover and consider the

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<sup>29</sup> n 28, at p 17; he refers to the distinction identified by Kloss, H. (1971), 'The Language Rights of Immigrant Groups', *International Migration Review* 5, pp 250-268.

<sup>30</sup> n 28, at p 22.

<sup>31</sup> n 28, at p 22. May uses the examples of Canada for its Inuit peoples in the new province of Nunavut, Quebecois in Quebec, Norway for its Sami people in the Northern Province of Finnmark; Catalan and Welsh medium education in Catalonia and Wales.

<sup>32</sup> n 28, at p 23. May uses the example of the Indian Constitution (Article 350A) which directs every state and local authority to provide adequate 'educational facilities' for first language instruction for ethnic minorities 'where numbers warrant'.

<sup>33</sup> *Maori Language Act 1987 (NZ)*.

<sup>34</sup> s 61 *Education Act 1989(NZ)*.

views and concerns of the Maori communities of the area. Under Section 63 every school charter is deemed to contain:

- (a) The aim of developing for the school concerned policies and practices that reflect New Zealand's cultural diversity, and the unique position of the Maori culture: and
- (b) The aim of taking all reasonable steps to ensure that instruction in tikanga Maori (Maori culture) and te reo Maori (the Maori language) are provided for the full-time students whose parents ask for it.

It is important to note that that this section is framed with reference to all, not only Maori, children. The view to be taken from this is that Maori language and culture is integral to all New Zealanders and should be reflected in the actions of schools accordingly.

There is provision in Section 64(2) of the *Education Act 1989 (NZ)* for the Secretary of Education to take proceedings against a board of trustees to enforce a school charter or constraining them from taking any action contrary to a charter. While the term 'proceedings' are not defined it is perhaps a conceivable avenue for enforcement of Maori language rights in education, in the situation where it could be shown that a school board was not taking reasonable steps to provide instruction in language and culture for those who were asking for it.

The New Zealand Curriculum Framework recognizes that Maori is the language of the *tangata whenua*<sup>35</sup> of New Zealand, that it is a *taonga* under the terms of the Treaty of Waitangi, and as it is an official language of New Zealand,<sup>36</sup> 'students will have the opportunity to become proficient in Maori'.<sup>37</sup>

All these provisions however stop short of a positive requirement for state-funded Maori language instruction.

### **Tolerance-orientated rights**

Article 30 of the United Nations Convention on the Rights of the Child states that: "In those states in which ethnic, religious or linguistic minorities or persons of Indigenous origin exist, a child belonging to such a minority or who is Indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her religion, or to use his or her own language."

The specific rights legislation which applies to all people in New Zealand is the *Human Rights Act 1993 (NZ)* and the *New Zealand Bill of Rights Act 1990*.

- *The Human Rights Act 1993 (NZ)*

Section 57 of that Act provides non-discrimination rights specifically in relation to education: "(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,— (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."

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<sup>35</sup> People of the land.

<sup>36</sup> Pursuant to the *Maori Language Act 1987 (NZ)*.

<sup>37</sup> Ministry of Education, Wellington, 1993.

The prohibited grounds of discrimination are contained in Section 21 and while ‘language’ is not specifically included therein it has been taken to be included by inference within the grounds of race and ethnic origin. The *Action Plan for Human Rights; Priorities for Action 2005-2010* formulated by the New Zealand Human Rights Commission,<sup>38</sup> states that its status report, *Human Rights in New Zealand Today*, identified a call for ‘language’ to be added as a prohibited ground for discrimination for the purposes of clarity.

A complaint under Section 57 could be of direct discrimination, in that a person was treated differently because of their language or culture. Or it may be of indirect discrimination, as the allegation made in 1992 against the Board of Trustees of Waitara High School in 1992. The actions of the school were the subject of a complaint relating to the bicultural provisions of the *Education Act 1989 (NZ)* above. The complaint was under Section 26 of the *Human Rights Commission Act 1977(NZ)*, the forerunner of Section 57 of the *Human Rights Act 1993 (NZ)*. The argument of the complainant, Te Whanau Whanui Ki Waitara, was essentially that Maori in the school were offered an educational environment in which they were treated differently. The complainants argued that their language and culture were not affirmed in the same way as was the language and culture of the English-speaking majority for a number of reasons. These reasons were given as: the inability of the school to appoint a Maori teacher to replace the teacher who had resigned; the inconvenient situation of the room used for Maori activities in the school; not allowing Maori students to have time out of school for Maori events and not taking up of offers of visits from local Maori. The Human Rights Commission decided that the complaint had substance.<sup>39</sup> In its reasoning, an appropriate and proper education for Maori was necessarily provided in an environment in which their culture was affirmed and in which they felt comfortable, such as was provided for non-Maori students. The Commission therefore concluded that on the facts, the Waitara board of trustees admitted Maori students on less favourable terms and conditions. It had denied them or restricted access to benefits or services provided by the school and had subjected them to a detriment by reason of their race. Whether this was a correct application of the provisions of the human rights legislation has been doubted.<sup>40</sup> It seems that the Commission was influenced to a significant extent by the educational policy, reflected in the *Education Act* and in the National Educational Guidelines, that Maori have access to an educational environment where they can learn their language and culture. The finding of the Commission is significant as it reflects a readiness and even enthusiasm, in a rights climate coupled with a resurgence of emphasis on *Maoritangi* and Treaty obligations, to bend the provisions of human rights legislation to fit the circumstances. A settlement was negotiated with the school.<sup>41</sup> In short, the school agreed as follows: to allocate the same time as other core subjects to *Te Tari Maori* (Maori language and culture); to put in place affirmative action programmes to raise the achievement level of Maori students; to form a Maori student council; to institute disciplinary procedures which reflected Maori culture and values; and to require all staff to attend a Treaty of Waitangi programme.

The issue of the teaching of and access to Maori language and culture in schools arose conversely in the *Broadwood Area School Case* in 1991. The Broadwood School Board of Trustees had formulated a curriculum, after the community consultation required by the charter under Section 62 of the *Education Act 1989 (NZ)*, which included compulsory Maori language instruction for all pupils. A parent of a student at the school unsuccessfully sought an exemption from the school board. In the publicity which followed the issue became the legitimacy of the board’s policy and the parents’ threat to test this by legal action. The matter did not reach court and it was resolved by the passing of an amendment to the *Education Act 1989 (NZ)*, incorporated into the Act as Section 25A. This enabled the school to lawfully grant a release to the student, on cultural grounds, from tuition. On the face of it

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<sup>38</sup> The Human Rights Commission (2005) *The New Zealand Action Plan for Human Rights Ma ki e Tangata: Priorities for Action 2005-2010*, Wellington, New Zealand.

<sup>39</sup> This finding then triggered the power to mediate under the *Human Rights Commission Act 1977 (NZ)*.

<sup>40</sup> Particularly by Rishworth, P. (1993), ‘Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum’, *Legal Research Foundation Seminar: Education and the Law in New Zealand*, Auckland, New Zealand, pp 14-61.

<sup>41</sup> The settlement is reproduced in Walsh, P.J. & Bartley, J.R. (1999), “*Schools Go To Court*” Addison, Wesley, Longman NZ Ltd., pp 78-79.



however the board, in requiring compulsory language tuition for all students, had acted legitimately in accordance with the spirit reflected in the *Maori Language Act 1987 (NZ)*.

- *The New Zealand Bill of Rights Act 1990 (The Bill of Rights)*

As bodies performing a public function pursuant to statute, state schools in New Zealand are bound by the guarantees and rights contained in *The Bill of Rights*.<sup>42</sup> It follows that the rights therein apply to school teachers, as delegates of the state, school principals and school boards of trustees.<sup>43</sup> The *Bill of Rights* is on the same footing as the UK *Human Rights Act 1998* in that it does not share the supreme law status of the *US Constitution* or the Canadian *Charter of Rights and Freedoms*. Section 4 provides that in cases of conflict between this and other statutes, the other statutory provision must prevail, and Section 5 provides that the rights contained therein are subject to such reasonable limits as prescribed by law or as may be justified in a free and democratic society. Significantly however, Section 6 provides that all other statutes are to be interpreted in a manner which is consistent wherever possible with the *Bill of Rights*. The affect of these provisions in the context of education is that the *Education Act* and other related Acts must be interpreted in a way so as to best give effect to the rights guaranteed by the *Bill of Rights*. A school however may curtail a right contained therein where it is able to demonstrate a justification. The effect of this may be, if a person complained of an infringement of a right and the school could show that it was not unreasonable judged by the standards of a free and democratic society, the school's action may be held to be reasonable and therefore not an infringement of the *Bill of Rights*. The rights with specific application to language are Section 19 which provides: "Freedom from discrimination — (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993."<sup>44</sup>

And Section 20, which is based on Article 27 of the International Covenant on Civil and Political Rights, provides: "Rights of Minorities — A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language, of that minority."

The question arises whether a school syllabus may be challenged on the basis that infringes the above rights in respect of language. Could a Maori parent or a parent of another significant ethnic minority require, under Section 20, a greater recognition of their language in schools, and greater allocation of resources for that purpose?

Pursuant to Section 60A of the *Education Act 1989 (NZ)* the Minister of Education prescribes *National Education Guidelines* which include national educational goals, national curriculum objectives, which are phrased in broad general terms, and national administration guidelines (referred to above). The charter of each school is statutorily deemed to contain these *National Education Guidelines*.<sup>45</sup> In addition, as set out above, each charter is deemed to contain the aims of developing policies and procedures in respect of language and culture. The board of trustees must consult with the Maori community in respect of the content of the school charter.<sup>46</sup>

However, the setting of the syllabus for the teaching content of each subject within those aims and guidelines is, in the case of primary and intermediate schools, prescribed by the Minister.<sup>47</sup> In the case of secondary schools, while it is the New Zealand Qualifications Authority (NZQA) which has the power to prescribe syllabi, the scope and treatment of the material prescribed in the syllabus may, with the approval of NZQA be freely decided by the school principal. In any event, all those involved with

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<sup>42</sup> Pursuant to s 3.

<sup>43</sup> Who have the power respectively, pursuant to ss 75 & 76 to manage and to control management of a state school, subject to any enactment or the general law of New Zealand.

<sup>44</sup> This section was substituted for the original section from 1 February 1994 by the *Human Rights Act 1993 (NZ)*.

<sup>45</sup> s 61 *Education Act 1989 (NZ)*, referred to above.

<sup>46</sup> ss 62 & 63 *Education Act 1989 (NZ)*.

<sup>47</sup> s 75 (1A) *Education Act 1964 (NZ)*.

deciding what it is to be taught in state schools, and how it is to be taught, are subject to the *Bill of Rights*. While the educational objectives in the *National Education Guidelines* are broadly stated so as to make grounds for a challenge unlikely, complaints of breach against individual schools such as in the *Waitara* case are more likely. It is to be assumed that a complaint would be made in the first instance to the school teacher, principal or board of trustees. Failing resolution, the next question becomes: what is the role of the courts in considering allegations of a breach of the *Bill of Rights* by a school? If a parent were to invoke court processes to challenge a school course or activity on the basis that it infringed the right to culture and language contained in Section 19 or Section 20 of the *Bill of Rights* the first question would be whether the right applies in that situation. In this context this would be whether there was discrimination on the grounds of culture or ethnic or national origin, or whether the action involved a restriction on the rights of a minority to use their language. The question then returns to whether the right is actually infringed and this involves a consideration of whether the action is a 'justified limitation' on the right in terms of Section 5. The test which has been applied here is whether the importance of the overall objective of the action may be justified, balanced against the alleged rights invasion.<sup>48</sup> Finally, the consideration becomes the extent to which the courts, as bodies charged with ensuring that rights are not infringed, would be prepared to question pedagogical decisions.<sup>49</sup> Thus far, this has not been tested.

### **Maori Language in Tertiary Education**

Maori language programmes and qualifications are offered at most universities and polytechnics in New Zealand.<sup>50</sup> As with the compulsory school system, while those tertiary institutes which are public bodies are subject to the non-discrimination provisions of the *Human Rights Act 1993* and the *Bill of Rights*, no specific right exists for tuition in higher education in the Maori language.

There are however tertiary education institutes known as *wananga* which are state-accredited to provide polytechnic and university type programmes with an emphasis on Maori language, customs and culture. *Te Wananga o Aotearoa (wananga)* was started in 1983 by a group of Maori with a vision of improving Maori education and skills and it was granted status as a tertiary education institute in 1993. While the *wananga* throughout New Zealand have played, and continue to play, a significant part in the revitalization of Maori language and culture, their path has not been easy and issues relating to their management and governance continue to attract much media coverage. The controversy which now surrounds *wananga* is seen to relate substantially to the differing perceptions held by the Crown and by Maori as to its true role in the provision of tertiary education.<sup>51</sup>

In 1997 a claim on behalf of *wananga* was lodged with the Waitangi Tribunal. This claim was based on the alleged failure of the Crown in its responsibility under the Treaty to provide proper funding for the education of Maori in an appropriate educational environment. The *Wananga Capital Establishment Report*<sup>52</sup> was presented to the Minister of Maori Affairs in 1999. Fundamental to the recommendations of the Waitangi Tribunal were the following words:<sup>53</sup> "Wananga is an ancient process of learning that encompasses te reo [language] and matauranga Maori [studying from a Maori perspective]. Wananga embodies a set of standards and values. As a verb, 'to wananga' is to make use of matauranga Maori in all its forms in order to teach and learn. It is clear that te reo Maori and matauranga Maori are taonga [treasures]. Wananga is given life by these taonga and in the reciprocal

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<sup>48</sup> *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA)

<sup>49</sup> Refer Rishworth, P. (1993), 'Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum' *Education and the Law in New Zealand*, Legal Research Foundation, pp 12-61, at pp 26-27.

<sup>50</sup> With the exception of some Private Training Establishments established and accredited under the *Education Act 1989 (NZ)*.

<sup>51</sup> Considered to be of fundamental significance by the Waitangi Tribunal in the 1999 Report (*Wai 718*) and the Report of 2005 (*Wai 1298*), as the rationale behind the Crown's view reflected in government policy. Both reports are discussed below.

<sup>52</sup> *Wananga Capital Establishment Report (Wai 718)*; <http://www.waitangi-tribunal.govt.nz/reports>

<sup>53</sup> *Wananga Capital Establishment Report (Wai 718)*, at p 48.

nature of the Maori world, wananga also serves to give life to te reo and matauranga. Each is dependent on the others to nurture, sustain and develop.”

The tribunal found that the *wananga* had been disadvantaged by the Crown’s tertiary education policies. Specifically it found the Crown to be in breach of its Treaty obligations of biculturalism, as an integral part of the Treaty partnership, and its guarantee of *rangitiratanga* or Maori self-management. Importantly, in light of subsequent developments set out below, the Tribunal found:<sup>54</sup>

Two of the principal reasons for the development of modern wananga by Maori were to address the current underachievement of Maori in tertiary education and to help in the development of New Zealand society generally. Another primary objective of wananga is to help revitalise te reo Maori [Maori language] and matauranga Maori.

The Tribunal recommended certain payments to be made by the Crown to *wananga* on a comparable basis to the funding of other tertiary institutes. This recommendation was incorporated in a Deed of Settlement dated 6 November 2001. A partnership agreement which was to be created between *wananga* and the Crown which would set out the goals, principles and commitments of the relationship was drafted but never concluded.

By 2003 the *wananga* had a large number of campuses throughout particularly the North Island of New Zealand and it was one of the country’s largest providers of tertiary education, with 59% of its students being Maori.<sup>55</sup>

However, in 2005, the Crown, in return for continued funding, required *wananga* to implement a new charter and profile which would significantly change its vision and future. In short, the Crown proposed that *wananga*, in return for receiving payment of the suspensory loan provided for in the 2001 Deed of Settlement, work progressively towards full Maori enrolment. This is in contravention of what *wananga* sees as its true role which is to provide quality Maori-centred tertiary teaching and learning to all learners, not only Maori, and to encourage research undertaken in accordance with Maori custom and tradition. This view is reinforced by the definition of a *wananga*, as contained in the *Education Act 1989 (NZ)* (as amended by section 36 of the *Education Amendment Act 1990 (NZ)*), which is:<sup>56</sup>

A wananga is characterised by teaching and research that maintains, advances, and disseminates knowledge and develops intellectual independence, and assists the application of knowledge regarding ahuatanga Maori (Maori tradition according to tikanga Maori (Maori custom)).

The government’s attempt to impose its narrow view of the role of *wananga*, which is essentially to deliver Maori courses to Maori, led to a further claim to the Waitangi Tribunal. On behalf of *wananga*, the claimants’ case was again based on the argument that the Crown’s intervention raised significant issues relating to the *rangitiratanga* or self-determination of the governing Maori. The Tribunal heard the claim under urgency and reported to the Government in December 2005. While accepting the responsibility of the Crown (by virtue of its *kawanatanga* or governorship) to ensure that all tertiary institutes comply with statutory requirements and ensure adequate standards in terms of course quality, governance and financial management, the Tribunal found that the Crown’s actions had breached the principles of the Treaty in failing to protect the *rangitiratanga* of *wananga*. The recommendations of the Tribunal were that the Crown uses its best efforts to conclude the partnership agreement as drafted following the 2001 Deed of Settlement. It also recommended that the proposed charter be renegotiated to correctly reflect the nature of the *wananga* and to set up a structure which best enables mutual engagement and understanding. Significantly the Tribunal recommended that the

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<sup>54</sup> *Wananga Capital Establishment Report (Wai 718)*, at p 53.

<sup>55</sup> *Waitangi Tribunal Report (Wai 1298)* (2005) retrieved from <http://www.waitangi-tribunal.govt.nz/reports>

<sup>56</sup> s 162(4)(b)(iv).

Crown acknowledges formally ‘the invaluable and innovative contribution made by the Aotearoa Institute and the founders of Te Wananga o Aotearoa to education in Aotearoa/New Zealand’.

At the time of writing, these recommendations await the Government’s response.

### 3. Conclusion

The Human Rights Commission has stated that its goal is a bilingual New Zealand by 2040, or 200 years on from the signing of the Treaty of Waitangi. For that aim to come anywhere close to realisation, a policy shift on the part of central government is required, relating to all levels of education. At the very least there needs to be a substantial appropriation of funds towards the training of teachers in the Maori language and for the provision of all school resources to be printed in the Maori language.

New Zealand is almost unique in the world in recognizing the language of the indigenous peoples as a national language. However, as noted by Stephen May (referring to Benton, 1988), this recognition is limited in that it does not extend the right to use or to demand the use of Maori in the public domain beyond its oral use in courts and tribunals.<sup>57</sup> Nevertheless, such recognition arguably carries with it more than just a tolerance of its use. The status as a national language imposes a responsibility on the part of the state. If such status is to be taken seriously, and to have practical effect, the state must actively promote the use of the language within the community and particularly within the education system. It could be said that failing to appropriate sufficient resources to work towards the reality of a bilingual New Zealand amounts to a breach of the requirements imposed on schools by the *Education Act 1989 (NZ)* and the *National Educational Guidelines*. It also brings into question the commitment to the right not to be discriminated against on the grounds of culture and ethnicity and the rights of minorities contained internationally in the *Universal Declaration on Human Rights*, the *International Convention on Civil and Political Rights*, the *International Convention on the Rights of the Child* and nationally embedded in the *Human Rights Act 1993(NZ)* and the *Bill of Rights*.

The failure of the state to positively promote bilingualism through compulsory Maori language instruction in state schools is high among the reasons advanced for the poor record of Maori in achievement in compulsory education and the low participation of Maori in tertiary education. In the words of Roslyn Noonan, the New Zealand Human Rights Commissioner:<sup>58</sup> “Maori whanau, hapu and iwi are calling for greater autonomy in shaping and determining educational success for Maori. Debates are ongoing about whether educational success for Maori can be achieved through partnerships with the State, independence from the State, or both. What is clear from educational achievement indicators is that a disproportionate percentage of Maori are failing within current education structures. It is also clear that Maori, as a people, do not have access to the kind of education that enables the full development of their personality and sense of dignity, and their participation as adults in meaningful and rewarding employment.”

Language and culture are central to the belonging or *turangawaewae* of the indigenous people of Aotearoa New Zealand. There is a strong argument that it is through language that the imbalance in Maori educational achievement may be redressed. The benefit from this is clear, not only for Maori but also for the future of the nation as a whole.

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<sup>57</sup> May, S. (2002), ‘Accommodating multiculturalism and biculturalism in Aotearoa/New Zealand: implications for language education’ *Waikato Journal of Education*, 8, pp 5-26.

<sup>58</sup> The Human Rights Commission (December 2003), *The Right to Education He Tapapa Matauranga: A Discussion Document*, at p 12.