Rights to Education under Australian Law

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Introduction

Article 2 of the First Protocol to the European Convention on Human Rights[1] provides:

> 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.'[2]

Obviously the European Convention does not apply in Australia[3] but what rights to education do Australian children and their parents have? Are there any corresponding duties? This chapter will examine Australia obligations under international and domestic law and will test its success in meeting those obligations.

Sources and Application of Conventions under Australian Law

Australia is party to a number of international treaties recognizing a right to education:
- UNESCO Convention against Discrimination in Education (1962);
- International Covenant on Economic, Social and Cultural Rights (1966);
- Convention on the Rights of the Child (1989);
- International Convention on the Elimination of All Forms of Racial Discrimination (1965);
- Convention on the Elimination of All Forms of Discrimination Against Women (1981)

Under Australian law, a convention has to be given force in domestic law by Act of Parliament before it has direct effect. Accordingly the above treaties have not been incorporated into Australian law merely by their ratification or accession.[4] While the Sex Discrimination Act 1984 (Cth), the Racial Discrimination Act 1975 (Cth) and the Disability Discrimination Act 1992 (Cth) go a long way towards implementing the respective discrimination conventions, the Convention on the Rights of the Child is not supported by domestic legislation in Australia except as indicated below.

Australia follows the British model where the executive government has the power to enter into treaties, but parliament has the power to implement them.

Nevertheless, a ratified treaty has some influence on Australian domestic law, even when not enacted in domestic law:

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1 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4th November, 1950.

2 As to the application of this article in Europe see *Williamson v. The Secretary of State for Education and Employment* [2002] EWCA Civ 1926 and *Newton (a minor), Re Application for Judicial Review* [2001] *NIQB* 1 (17 January 2001).

3 Though one should not conclude it has no effect. United Kingdom courts are often called upon to apply it and these decisions may then be influential on Australian law. See for example 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).

4 Cranwell, G. (2001), 'Treaties and Australian Law – Administrative Discretions, Statutes and the Common Law', *QUTLJ*, p. 5.

First, the Convention on the Rights of the Child is, among other conventions specifically included in a Schedule to the Human Rights and Equal Opportunity Commission Act 1986 (Cth). This does not technically implement the Convention in Australian law however it does assist in the defining of human rights and makes this international instrument 'the subject of the functions of the Human Rights and Equal Opportunity Commission' (HREOC).[5] Breaches of the Convention can be notified to HREOC.

The second reason is that a minister is required to pay some attention to treaties when exercising a discretion. In Minister for Immigration and Ethnic Affairs v. Teoh[6] the Australian High Court had to determine if a minister exercising a discretion whether to deport a criminal had to take into account the rights of his children under the Convention on the Rights of the Child. A majority of the High Court found that it did.
Subsequently, the Federal Government proposed the Administrative Decisions (Effect of International Instruments) Bill 1999 with the direct purpose of reversing the decision in Teoh but this did not gain the support of the opposition controlled upper house (the Senate) in the Australian Parliament. One state parliament, South Australia, has passed the Administrative Decisions (Effect of International Instruments) Act 1995 with the effect of reversing the Teoh decision in relation to ministerial discretion in that State. The decision in Teoh remains controversial, and the High Court has been critical of the decision in a more recent decision, Lam v. Minister for Immigration and Ethnic Affairs.[7]

Third, treaties and customary international law may impact on the common law of Australia,[8] 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 clear.[9]

General educational rights in Australian Society

It is not possible in Australia to point to a right to education *per se*, though certain aspects of the rights contained in the above conventions have been enacted.[10] Australia is a federation where school education is controlled at the State and Territory level. A detailed analysis in Australia of a right to education therefore requires an examination of a number State and Territory Acts,[11] and in addition Federal racial, sex, and disability discrimination legislation. There is also State and Federal legislation and a code of conduct protecting international students studying in Australia.[12]

Parents' and Children's Rights

Specifically there are rights:

(i) to free state, but not free private school education;[13]

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5 *'X' v. Minister for Immigration & Multicultural Affairs* [1999] FCA 995 (23 July 1999) per North J at para. 42.

6 *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273.

7 *Lam v. Minister for Immigration and Ethnic Affairs* [2003] HCA 608: see Charlesworth, H., Chiam, M., Hovell, D. and Williams, G. (2003), 'Deep Anxieties: Australia and the International Legal Order', *SydLRev*, 25, at p. 450.

8 Cranwell, G. (2001), 'Treaties and Australian Law – Administrative Discretions, Statutes and the Common Law', *QUTLJJ*, 1, at p. 52. Charlesworth, H., Chiam, M., Hovell, D. and Williams, G. (2003), 'Deep Anxieties: Australia and the International Legal Order', *SydLRev*, 25, at p. 452.

9 Cranwell, G., footnote 8 above at pp. 59-61.

10 Human Rights and Equal Opportunity Commission (2000), *Education Access: National Inquiry into Rural and Remote Education*, at p. 10. The Report notes that one only state, New South Wales, contains legislation recognising a right to education. S. 4 of the Education Act 1990 (NSW) provides:

> 'Principles on which this Act is based
> In enacting this Act, Parliament has had regard to the following principles:
> (a) every child has the right to receive an education,
> (b) the education of a child is primarily the responsibility of the child's parents,
> (c) it is the duty of the State to ensure that every child receives an education of the highest quality,
> (d) the principal responsibility of the State in the education of children is the provision of public education.'

11 Education Act 1972 (SA), Education (General Provisions) Act 1989 (Qld); Education Act 1958 (Vic); School Education Act (WA) 1999; Education Act 1937 (ACT); Education Act 2003 (NT); Education Act 1994 (Tas); Education Act 1990 (NSW).

12 The relevant legislation is the Education Services for Overseas Students Act 2000 (Cth), the Code is The National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students. As to the detail of this legislation see Jackson, J., Regulation of International Education in Australia and New Zealand, ANZELA 13 Annual Conference, Wellington, New Zealand September, 2004.

13 See for example s. 22 of the Education Act 1958 (Victoria). In a 1997 Inquiry the Australian Law Reform Commission noted: 'The fundamental right of children to be educated is reflected in Article 28 of CROC. In particular it requires that primary education be compulsory and free to all and that different forms of secondary education, including general and vocational education, be available and accessible to every child. These principles are reflected in Australian requirements for compulsory education for children between 6 and 15 years of age (16 years in Tasmania)'. Australian Law Reform Commission (1997), *Seen and Heard: Priority for Children in the Legal Process*, ALRC Report No. 84, Australian Govt. Pub. Service, Canberra, at para 10.1. However, the Australian Law Reform Commission went on to find that 'Increasingly, however, primary and secondary schools are inviting voluntary contributions to the general

Education is compulsory, so in a strict legal sense parents have an obligation rather than a right to send their children to school. For example, the Queensland legislation provides:

> 'Each parent of a child of compulsory school age must
> (a) ensure the child is enrolled with a State educational institution or a non-State school; and
> (b) ensure the child attends the institution or school, on every school day, for the educational program in which the child is enrolled.'[14]

Exceptions exist, such as home schooling, though not in every state, and there is no right of home schooling *per se*.[15]

(ii) not to be discriminated against in education:
As noted above Australia has passed significant discrimination legislation. Legislation also exists at state level, though for present purposes only the Federal legislation will be described.

The Sex Discrimination Act 1984 (Cth) makes it unlawful for an educational authority to discriminate against a person on the ground of the person's sex, marital status, pregnancy or potential pregnancy: section 21.

Section 22 of the Disability Discrimination Act 1992 (Cth) renders it unlawful for an educational authority to discriminate against a person on the ground of the person's disability or a disability of any of that person's associates.

The Age Discrimination Act 2004 (Cth) makes it unlawful for an educational authority to discriminate against a person on the ground of the person's age: section 26.

The Racial Discrimination Act 1975 (Cth) provides that 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: section 9.
There is a significant body of Australian case law on this discrimination legislation especially in relation to disability discrimination in schools. One of the more difficult issues has been where a disability causes behavioural problems in class. This has been the subject of a recent appeal in the Australian High Court in Purvis v. New South Wales (Department of Education and Training)[16] where the Court found against the disabled child. Physical access has also been an issue,[17] though mainstreaming is now more common.[18]

support of the school' (at para 10.45). Similarly submissions to a joint parliamentary inquiry complained about the compulsory nature of 'voluntary' fees in the primary and secondary education systems: Parliament of Australia Joint Standing Committee on Treaties (1998), *United Nations Convention on the Rights of the Child – 17th Report*, August 1998, Commonwealth of Australia at paras 7.271 – 7.274.

[14] S. 114 (1) *Education (General Provisions) Act 1989* (Qld).

[15] But this is not automatic: for example in New South Wales a parent has to apply to register for home schooling: s. 71 of the Education Act 1990 (New South Wales). However, in other states such as Queensland home schooling is not mentioned in the legislation and parents would have to apply under s. 15 of the Education (General Provisions) 1989 (Qld) which provides various ministerial dispensations from compulsory attendance including distance education and health grounds.

[16] *Purvis v. New South Wales (Department of Education and Training)* [2003] HCA (11 November, 2003). On disability discrimination in education in Australia see Conroy, M., and Jackson, J., 'Disability and School Education: Law and Policy in the UK and Australia', in: Harris, N. and Meredith, P. (eds), *Children, Education And Health International Perspectives On Law And Policy*, (Forthcoming); Lindsay, K. (1997), 'Discrimination Law & Special Education', in: *School Law-1997 National Seminar Papers*, Legal & Accounting Seminars Pty Ltd, Sydney; Basser, L., and Jones, M. (2002), 'The Disability Discrimination Act 1992 (Cth): A Three-Dimensional Approach to Operationalising Human Rights', *Melbourne University Law Review*, 1; Forlin, C. and Forlin, P. (1998), 'The Legal Implications of Including Students with Disabilities in Regular Schools', in: Hauritz, M., Samford, C., and Blencowe, S., *Justice for People with Disabilities*, Federation Press, Sydney.

[17] *Stephanie Travers by her next friend, Wendy Travers v. State of New South Wales* [2001] FMCA 18; *Hills Grammar School v. Human Rights and Equal Opportunity Commission* [2000] FCA 658 (18 May 2000).

[18] In 1998, a joint parliamentary committee examining the *Convention on the Rights of the Child* took evidence suggesting that there were still significant barriers in trying to enrol disabled children in mainstream schools in Australia: Parliament of Australia Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child – 17th Report*, August 1998, Commonwealth of Australia at paras 7.277 – 7.288. See also Jones, M. (1999), 'Myths and Facts concerning the Convention on the Rights of the Child in Australia', *AJHR*, p. 28.

Other rights

Religious instruction

In Australian state schools parents may control whether their children receive religious instruction. This is not the case in private schools where parents will have to accept the religious policy of that school, having elected to send their child to that school. Typical is the New South Wales provision:

> 'No child at a government school is to be required to receive any general religious education or special religious education if the parent of the child objects to the child's receiving that education.'[19]

On the other hand provision can be made for religious education:

> 'In every government school, time is to be allowed for the religious education of children of any religious persuasion, but the total number of hours so allowed in a year is not to exceed, for each child, the number of school weeks in the year.'[20]

Religious instruction cannot be given under the guise of something else:

> 'In government schools, the education is to consist of strictly non-sectarian and secular instruction. The words "secular instruction" are to be taken to include general religious education as distinct from dogmatic or polemical theology.'[21]

Corporal punishment

The previously common practice of corporal punishment is generally banned in state schools and is either directly prohibited by statute[22] or policy. It is very unusual now in Australian schools. The Australian Law Reform Commission recommended its banning in all schools in 1997.[23] A joint parliamentary Committee noted in 1998:

> 'The law relating to punishment in schools varies in different jurisdictions and between independent and Government schools. Most States and Territories ban corporal punishment in government schools but permit corporal punishment in independent schools. While independent schools in most States are not prohibited from using corporal punishment, it was submitted that the Catholic sector tended to follow the legislation implemented for government schools.'[24]

The Committee also heard evidence re the European Court of Human Right's approach to corporal punishment in cases such as Y v. United Kingdom.[25] It concluded that it saw no need to recommend the banning of corporal punishment in schools as a condition of Commonwealth funding.[26]

Specific Groups

In addition to these general rights there are three groups of children in Australian society deserving special attention in relation to rights to education. These are the rights to education of Indigenous children, children in detention and children in remote and rural communities. These are now described:

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[19] S. 33 of the Education Act 1990 (NSW).
[20] S. 32(1) of the Education Act 1990 (NSW).
[21] S. 30 of the Education Act 1990 (NSW).
[22] See for example s. 35 (2A) of the Education Act 1990 (NSW): The guidelines and codes must not permit corporal punishment of students attending government schools.
[23] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* ALRC 84, 1997 at para 10.78.
[24] Parliament of Australia Joint Standing Committee on Treaties *United Nations Convention on the Rights of the Child – 17th Report*, August 1998, Commonwealth of Australia at para 7.330.
[25] *Y v. United Kingdom* (1994) 17 EHRR 238.
[26] Parliament of Australia Joint Standing Committee on Treaties *United Nations Convention on the Rights of the Child – 17th Report*, August 1998, Commonwealth of Australia at para 7.338.

(a) Indigenous Children and Education

(i) Case law

The International Convention on the Elimination of All Forms of Racial Discrimination provides in Article 5(e)(v):

> 'In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: .... The right to education and training;'

This convention is contained in a schedule to the Federal Racial Discrimination Act 1975 (Cth), and accordingly has been argued in Australia courts and tribunals. In Carson & Ors v. The Minister of Education (Qld) & Ors[27] it was claimed that this Act rendered unlawful the exclusion of six Indigenous students from a state school in Queensland, under a regulation allowing the Director General of Education to exclude when it is satisfied that the student was guilty of disobedience, misconduct, or other conduct prejudicial to the good order and discipline of the school. This argument was not accepted by HREOC, there being no evidence that race was the basis for exclusion.[28]

The Convention was also argued in Aboriginal Students Support & Parents Awareness Committee Traeger Park Primary School v. Minister for Education, Northern Territory of Australia.[29] In this case the complaint was that the decision to close a primary school in the remote town of Alice Springs and transfer all students to another school in that town was unlawful under the Racial Discrimination Act. The school was regarded as an Aboriginal school. That school was targeted because enrolments had been below capacity and were not likely to improve. HREOC rejected this argument:

> 'And 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.
>
> As noted above I consider that the respondent in this case cannot be said to have been intent upon the destruction or impairment of the enjoyment or exercise of the right to an education by the relevant Aboriginal children. The respondent was plainly intent upon recognising the right of Aboriginal children in Alice Springs who attended Traeger Park School to an education. The respondent was asserting however that that right could continue to be enjoyed and exercised even if the educational services were provided for the students in a different form and at a different school or location.'[30]

(ii) Reports

In its Report into rural and remote education HREOC has had some very important things to say about education in remote Aboriginal communities where ill-health, disability, poverty, isolation, high mobility and transience were disturbing factors. There was evidence of:

- Indigenous children in Homeland Centres and outstation communities being without schools, teachers or tutors to supervise distance education;
- Indigenous teenagers with no accessible secondary school curriculum;

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[27] *Carson & Ors v. The Minister of Education (Qld) & Ors* [1989] HREOCA 4 (2 June 1989).
[28] *Ibid.* at 9.
[29] *Aboriginal Students Support & Parents Awareness Committee Traeger Park Primary School v. Minister for Education, Northern Territory of Australia* [1992] HREOCA 4 (26 February 1992).
[30] Footnote 29 at 11.

- Indigenous and non-English speaking children whose only curriculum is in a language which they have never heard spoken at home – English.[31]

A joint parliamentary report has also made some very disturbing findings in relation to Indigenous education, especially in relation to participation rates:

> 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.[32]

The converse of participation is exclusion and the Australian Law Reform Commission has found that 'Indigenous children are significantly over-represented in exclusion statistics.' They noted this was a particular issue 'given their already high school drop-out rate.'[33]

(b) Education and Children in Rural and Remote Locations

One obvious aspect of the right to education under the Convention on the Rights of the Child is that education 'must be accessible, either within safe physical distance or by correspondence or some other form of distance education'.[34] Australia is a vast continent yet sparsely populated except for its eastern seaboard. The question of access raises particular issues for rural and remote children.

The issues identified by HREOC[35] regarding children in rural areas include access to free bus transport, the time spent on buses getting to and from school, school time lost through floods and poor road conditions, internet access, equipment costs, technical support, access to videoconferencing, access to pre-school and secondary schools, access to large city facilities such as museums and particular difficulties for disabled children. Discrimination legislation will be of particular value to disabled or Indigenous children because they fit within a specifically protected group. Discrimination legislation does very little for rural and remote children who otherwise do not fit into a category within this legislation. Accordingly rural children have few legal rights, even if Australia fails its education accessibility obligations under the Convention on the Rights of the Child.

HREOC reached a number of disturbing conclusions regarding rural and remote children:

> 'And there is strong evidence that rural and remote children are generally disadvantaged in comparison with their urban counterparts. For example, rural and remote students are less likely to stay on at school after the compulsory years or to finish secondary school. The average Year 12 retention rates for boys is 63% in the capital cities but only 54% in rural and remote areas. For girls it is 74% in the capital cities but only 66% in country towns. Year 12 retention is particularly low in the Northern Territory: only 23% of rural/remote boys and 25% of rural/remote girls stay on to Year 12.'[36]

(c) Children in Detention

A major legal, political and social issue in Australia concerns the rights of people held in detention centres because of their alleged unlawful entry into Australia. Australia has a policy of mandatory detention for illegal immigrants; many of these have been children.[37] In this section issues concerning their education are examined, namely, do they have a right to education, and if so what form must this take?

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31 Human Rights and Equal Opportunity Commission *Education Access: National Inquiry into Rural and Remote Education*, 2000 at 10-11.

32 Parliament of Australia Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child – 17th Report*, August 1998, Commonwealth of Australia at para 7.290.

33 Australian Law Reform Commission *Seen and Heard: Priority for Children in the Legal Process* ALRC 84, 1997 at para 10.76.

34 Sidoti, S, Australian Human Rights Commissioner, 'Access to education: a Human Right for Every Child', 29th Annual Federal ICPA Conference, Griffith NSW, Australia, 3 August 2000.

35 Footnote 31 above.

36 Footnote 34 above. The news is not all bad for children in remote areas. Australia has pioneered the world in distance education at primary, secondary and tertiary levels. Its famous School of the Air is one example, though many children (including the present writer) completed their primary education in state run 'correspondence schools'.

37 2,184 children were held in detention between 1999 and 2003, and in July 2004, 95 children were in detention. 'Editorial', *The Age*, 7 July, 2004.

The case law in this area has not so much concerned their rights to education as their rights not to be detained. Nevertheless, Australians have to accept such detention as a matter of fact and law and something the Howard Coalition Government[38] has insisted on despite its international obligations to children. Fortunately, significant pressure has been placed on the Australian Government by HREOC's findings in its *Report of the National Inquiry into Children in Immigration Detention*.[39] The number of children in detention has reduced, partly because of the Report and the pressure it bought on a government facing re-election, partly because some of the children are now 18, and partly because the number of incoming refugees has decreased. Some of this reduction has been brought about by the governments 'Pacific solution' whereby potential illegal immigrants to Australia have been detained in centres in countries such as Nauru, deliberately out of the reach of Australian domestic law, and superficially removed from Australia's obligations under international law.

The Report has found that the immigration detention laws created a system that was 'fundamentally inconsistent with the Convention on the Rights of the Child'.[40]. It failed to give prime consideration to the rights of children, did not treat them with dignity, placed them at 'high risk of serious mental harm',[41], and importantly for present purposes, has meant that 'at various times children in immigration detention "were not in a position to enjoy .... the right to an appropriate education on the basis of equal opportunity."'[42] HREOC reached these conclusions based on Article 2 and Article 28 of the Convention on the Rights on the Child, concluding that Article 28 'reinforces the general principles of non-discrimination by specifically recognising the right to education for all children on the basis of "equal opportunity".'[43] In relation to education HREOC reached a number of specific conclusions:

- Education to children in detention fell significantly short of levels provided in the community generally;
- Children were inadequately assessed as to their educational needs and there was insufficient reporting of their progress;
- There was insufficient infrastructure, curriculum resources, and teachers;
- On occasions teachers did not have ESL qualifications;
- Hours of schooling were often under the standard 6 hours a day prevailing in Australian schools;
- Children under 15 were not required to attend school, and attendance levels were low, this was linked to depression among long term detained children.[44]
- The schooling of most children was provided inside detention centres rather than in normal schools, though by 2003 a significant proportion were attending outside schools.[45] Most of the internal schooling was provided by teachers wearing guards' uniforms causing confusion in the children.[46]

On education the Report concluded:

> 'The right to enjoy a level of education, on the basis of equal opportunity with similar children in the Australian community, is closely linked to a child's right to achieve the highest possible level of development under article 6(2) of the CRC. It is also an important factor to take into account when assessing Australia's compliance with article 37(c), which requires that there is respect for the inherent dignity of children, taking into account the needs of their age. Since compliance with the JDL Rules is a useful guide for assessing whether or not there has been compliance with article 37(c), it is relevant to note that those rules recommend that children be sent to schools external to a detention facility and that there be an appropriate curriculum for those children beyond the compulsory age of education. As set out above, there have been periods of time during which those rules have not been complied with.'[47]

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[38] A Federal Government returned in 2001 based in large part by its 'get tough on illegal immigration policy', fanned by the Howard Government's false claims in the 2001 election campaign that illegal immigrants had thrown their children overboard to cause Australian naval vessels to come to their rescue (thereby completing their attempt to gain Australian protection as refugees). This matter generated an ongoing Senate inquiry, the *Senate Select Committee for an Inquiry into a Certain Maritime Incident*, available at http://www.aph.gov.au/Senate/committee/maritime_incident_ctte/.

[39] Australian Human Rights and Equal Opportunity Commission, *A Last Resort: The Report of the National Inquiry into Children in Immigration Detention*, 2004.

[40] *Ibid.* at 849.

[41] *Ibid.* at 850.

[42] *Ibid.* at 850.

[43] *Ibid.* at 581.

[44] *Ibid.* at 636-637.

[45] *Ibid.* at 587.

[46] *Ibid.* at 606. The difficulties facing the teachers is demonstrated by this comment made to HREOC by an education coordinator: 'When you've got 400 children and four classrooms, it's actually not possible to get them in there for five hours a day and teach them all for five hours a day', at 614. The comment demonstrates the foolishness of trying to educate within the detention facility and the mandatory detention policy in its application to children, a conclusion supported through the evidence gained by HREOC at 624, 636-638.

[47] Footnote 39 above at 638.

There have been few cases where the above issues have arisen in Australian courts. However in Jaffari v. Minister for Immigration & Multicultural Affairs, French J was critical of Australia's failure to meet its obligations to educate children outside detention centres:

> 'There appears to be a significant discrepancy between the guidelines published by the United Nations High Commission on Refugees in respect of unaccompanied minors seeking asylum and the current administration of the Migration Act in relation to such persons.'[48]

Even more liberal High Court judges such as Kirby J have decried the ineffectiveness of treaty rights not enacted in domestic law, including those relating to children:

> 'Mandatory detention of unlawful non-citizens who are children is the will of the Parliament of Australia. It is expressed in clear terms in ss 189 and 196 of the *Migration Act 1958* (Cth). Those sections are constitutionally valid. In the face of such clear provisions, the requirements of international law (assuming it to be as the respondents assert and as the UNHRC, in part, has found) cannot be given effect by a court such as this. This Court can note and call attention to the issue. However, it cannot invoke international law to override clear and valid provisions of Australian national law. The Court owes its duty to the Constitution under which it is established.'[49]

In the same case Callinan J stated:

> 'The respondents sought to rely on the United Nations Convention on the Rights of the Child. .... The Convention cannot expand the intended and clearly identified scope of Pt VII of the Family Act. Australia's treaty obligations do not form part of Australian domestic law unless incorporated by statute. Whatever relevance the Convention may have as a declared instrument under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), it has not actually been incorporated into the domestic law relating to the detention of unlawful non-citizens which is the subject of express provision under the *Migration Act*.'[50]

Conclusions

In this article a number of things can be written on the Australian right to education report card. First it has not implemented many of its international treaties. Failure to implement children's rights in domestic law has been described by HREOC Commissioner, Dr Sev Ozdowski as 'the "worm" at the heart of the international treaty system'. He notes that there is no 'international enforcement method, no international crimes against children tribunal'[51] and accordingly unless this occurs or a country agrees to the jurisdiction of an external court[52] the rights enshrined in the treaty cannot actually be legally enforced.[53] The above passages from Minister for Immigration and Multicultural and Indigenous Affairs v. B markedly demonstrate that. Some rights especially those relating to discrimination have been enacted, and as a direct result there has been an improvement in the education rights of some categories especially those of disabled children.

In recent years the saddest failure in Australia in relation to education rights has been to our refugees. Accordingly the breaches of the Convention of the Rights of the Child committed by Australia in relation to its policy on mandatory detention, especially in regard to the education of children have gone unchecked. The children in greatest need in Australia in the last 5 years have had few rights and we have largely failed their education needs.

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[48] *Jaffari v. Minister for Immigration & Multicultural Affairs* [2001] FCA 1516 (26 October 2001) at 15. Jaffari's case failed because his action was out of time. It has been noted that but for this an interesting argument relating to the right to education of an unaccompanied child in a detention centre would have been made: the Minister for Immigration & Multicultural Affairs is the guardian of such a child, and accordingly has a legal obligation under state education acts to educate a child up to the age of 15. See Naylor, A, *The Right to Education*, Human Rights Day Address Bahá'í Temple, Mona Vale, Sydney 8 December 2002, available at http://www.hrca.org.au/education.htm.

[49] Kirby J in *Minister for Immigration and Multicultural and Indigenous Affairs v. B* [2004] HCA 20 (29 April 2004) at para. 171.

[50] Callinan J in *Minister for Immigration and Multicultural and Indigenous Affairs v. B* [2004] HCA 20 (29 April 2004) at para. 220.

[51] 'The rights of the child and international human rights law', Keynote presentation given by Dr Sev Ozdowski OAM, Human Rights Commissioner at the 1st International Congress on Child Migration, Tuesday 29 October 2002, Hyatt Regency, New Orleans at 6.

[52] His example is Britain's agreeing to the jurisdiction of the European Court of Justice.

[53] Footnote 51 above at 6.

Over a longer period of time various reports have shown we have also failed the education rights of many of our urban and rural Indigenous children, and furthermore, children in remote locations are marginalised and disadvantaged.

There are positives. The brutalising corporal punishment that many of us remember from our school days is prohibited in virtually all state schools, and uncommon in the private system. Religious instruction is a matter of parental choice, if the child attends a state school no particular religious education can be compelled, and if a parent choses to send a child to a private school the child will be instructed in the religion of that school if there is one. State based education is largely free though some fees do exist. The private school system in Australia is heavily subsidised by the Federal government, this remains an area of some controversy.

One of the more significant positives is the very existence of HREOC. This Commission, though funded and established by the Federal Government, has shown itself to be without fear in its inquiries, especially in relation to children in detention, and has brought significant pressure on the Australian government to improve the education of children in detention. It has also played a key role in discrimination matters, having the power to seek leave to intervene in human rights cases.[54] This provision is widely drafted and is not limited to human rights matters where Australia has passed ratifying legislation such as the anti discrimination statutes described earlier in this chapter.[55] Accordingly HREOC is a major political and legal force in the protection of children's rights in Australia.

[54] S. 11 (1) of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) provides: The functions of the Commission are: (o) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues.

[55] For example, leave was sought and obtained in the important decision of *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, described earlier in this article.