INDIGENOUS LANGUAGE AND LANGUAGE RIGHTS IN AUSTRALIA AFTER THE *MABO (NO 2)* DECISION — A POOR REPORT CARD

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ABSTRACT

This paper investigates one element of the decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, namely Indigenous languages, and whether there has been a transformational shift in the treatment and recognition of Indigenous languages and language rights post-Mabo. The paper considers how central language was to the success and content of the Mabo decision. It then critically analyses language rights and laws in Australia, and how these rights are met, or otherwise, in Australia. Native title has opened a window for language recognition in some circumstances for some native title holders, which has been transformational in practice for some native title holders and symbolically transformational for Australia. Otherwise the Report card for Australia on respectful treatments and recognition of Indigenous languages is very poor. Case-studies in modern-day discrimination against Indigenous language speakers are presented, in the education system, in consultation about Indigenous-specific government initiates, in voting and in the criminal justice system. This is in contrast to comparable nations such as New Zealand and Canada, and requirements under International treaties that Australia has ratified or committed to. The way forward is not technically elusive given successful precedents world-wide. Overcoming hurdles for recognition partly rest with exposing and firmly rejecting socio-political views that Indigenous languages are problems, and naturally becoming extinct. A first step is to improve the Overcoming Disadvantage framework, which is supported by all governments, so that it includes indicators that monitor progress in overcoming discrimination, including overcoming discrimination against Indigenous language speakers. Such indicators need to be informed by a view that Indigenous languages are precious and empowering resources for Indigenous peoples, and indeed all Australians and all of earth's citizens.

I INTRODUCTION

The decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo (No 2)*') has been transformational in many ways. One of its most important legacies has been that it jolted Australia into being more internationalised, where there is legal recognition of Indigenous peoples' existing rights. This paper investigates one element of the *Mabo (No 2)* decision, Indigenous languages, and whether there has been a transformational shift in the treatment and recognition of Indigenous languages and

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language rights post-Mabo. Culture is intertwined, indivisible, from language, and both were at the heart of the *Mabo (No 2)* decision.[1] So the investigation for this paper is an obvious one. It is prompted by the sad fact that Australia's national dialogue and literature on Indigenous languages and issues is limited. Australian dialogue on this subject, beyond the highly technical or very local, does not adequately reflect the priority that Indigenous peoples give to it, or the internationally acknowledged resource Indigenous languages in Australia represent.[2] The author hopes that this paper contributes to giving more prominence to Indigenous languages and to overcoming hurdles for their recognition in Australia.

The first section of the paper explains how central language was to the success and content of the Mabo decision. This is followed by a section that sets out some background to language and useful frameworks for critical analysis about language issues in Australia, for non-linguists (such as the author). The final two sections provide an overview of international and domestic language rights and laws, and an assessment of how these rights are met or otherwise in Australia.

II Language and the Mabo Litigation

Just how intimately language was involved with the Mabo litigation is not well appreciated. First it needs to be understood that at the time that the Mabo litigation was conceived in 1982, the assimilation policies and practices of governments, which aimed to have Indigenous peoples live like 'other Australians' speaking only English, were still a reality.[3] This assimilation drive occurred across Australia over a lengthy period (in some areas into the 1980s) and involved the systematic and forcible removal of children, in order to ensure that '[c]ulture, language, land and identity were …stripped from the children in the hope that the traditional law and culture would die by losing their claim on them and sustenance of them'.[4] Such practices were underpinned by socially constructed racial hierarchies that denigrated Indigenous culture. In this overtly racist context, the legal team for the Mabo litigation began work with Edward Koiki Mabo (Koiki was his preferred traditional name) and other clients (plaintiffs), including

[1] The *Mabo (No 2)* decision is widely understood to be legal authority for the existence of native title in Australia, and what is perhaps less well understood is that the decision relied on findings based on evidence about critical matters in traditional languages. In recognising native title, that is the survival of pre-sovereignty rights concerning lands of native title holders (crown sovereignty in the Mabo case was found to be acquired in 1895), the High Court also considered the scope and content of native title rights. The Mabo decision established that the nature of these rights is determined by the nature of rights in traditional laws and customs, noting that these customs and laws are not 'frozen' but may have evolved after sovereignty was acquired. Their evolved form will determine the nature of native title rights today. See Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) 16.

[2] Daniel Nettle and Suzanne Romaine, *Vanishing Voices: The Extinction of the World's Languages* (Oxford University Press, 2000); United Nations Education, Scientific and Cultural Organization, *UNESCO Atlas of the World's Languages in Danger* (20 October 2017) <http://www.unesco.org/languages-atlas/>.

[3] Australian Human Rights Commission, 'Bringing Them Home — National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (Report, April 1997) ('*Stolen Generations Report*').

[4] Ibid Pt 3 Consequences of Removal from Bringing Them Home.

James Rice and Dave Passi. It was the two latter claims which ultimately provided the basis in fact for the recognition of native title by the High Court.[5]

Bryan Keon-Cohen, junior counsel in the legal team, described his early observations of his clients' traditions and how their language, Meriam Mir (also spelt Mer), was central to these:

> In June 1982 the plaintiffs' legal team [Greg McIntyre, solicitor; the late Ron Castan QC, Barbara Hocking and Bryan Keon-Cohen, counsel] made its first visit to Mer …Whilst on the island for three days, we viewed it all (5 km long, 3 km wide) and travelled by dinghy to the two adjacent islands also under claim, Dawar and Waier … We marvelled at the tidy house plots and garden areas…We saw ladies examining the bare earth in front of their homes every morning for footprints, to ascertain whether anybody had 'trespassed' during the night, against the laws of Malo. We were told about, and shown written accounts of, these ancient Malo laws, one of which, broadly rendered, states [in Meriam Mir]:
>
> *Malo tag mauki mauki,*
> *Teter mauki mauki.*
> *Malo tag aorir aorir,*
> *Teter aorir aorir.*
> *Malo tag tupamait tupamait,*
> *Teter tupamait tupamait*
>
> Roughly translated from the Meriam, this means:
>
> *Malo keeps his hands to himself; he does not touch what is not his.*
> *He does not permit his feet to carry him towards another man's property.*
> *His hands are not grasping, he holds them back.*
> *He does not wander from his path. He walks on tiptoe, silent, careful,*
> *Leaving no sign to tell that this is the way he took.*
>
> All of this spoke to us of evidence of 'custom and tradition' and 'traditional connection to land'.[6]

The *Mabo (No 2)* case had many critical court hearings in its winding path to recognition of native title. But it was the hearings conducted by Moynihan J in the Supreme Court of Queensland that engaged most directly with people of Mir, the Meriam people, and inevitably their distinctive Meriam Mir language.[7] Hearings began in 1986, and were then adjourned until 1989.[8] In 1990 following an extraordinary amount of submissions and exhibits, some translated from Meriam Mir, a three-volume Determination of Facts with annexures was delivered by Moynihan J,[9] which formed the factual basis for the decision in *Mabo (No 2)*.[10]

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[5] Bryan A Keon-Cohen, 'The Mabo Litigation: A Personal and Procedural Account' (2000) 24(3) *Melbourne University Law Review* 893, 938.
[6] Ibid 914–915, citing Transcript of Proceedings, *Mabo v Queensland [No 2]* (Supreme Court of Queensland, Moynihan J, 16 November 1990) 134. The narrative 'Malo Ra Gelar' as given by 'Marou at Murray Island 15 February 1967'. The determination is partially reported in relation to admissibility issues in *Mabo v Queensland [No 2]* [1992] 1 Qd R 78 ('*QSC Determination*').
[7] These hearings came about when in 1986 Gibbs CJ remitted all issues of fact to the Supreme Court of Queensland. See *Mabo v Queensland [No 1]* (1988) 166 CLR 186 ('*Mabo (No 1)*').
[8] Adjournments of hearings in the Supreme Court of Queensland were due to parties seeking various determinations by the High Court, including in *Mabo [No 1]* (1988) 166 CLR 186 that the *Coast Islands Declaratory Act 1985* (Qld) which purported to extinguish native title was racially discriminatory and so invalid.
[9] *QSC Determination* [1992] 1 Qd R 78.
[10] Ibid.

Recognition by the High Court of native title involved the Supreme Court of Queensland making findings of fact about a system of traditions, customs and practices of the Meriam people concerning land.[11] In making findings of fact the Supreme Court of Queensland received evidence about the land system of the Meriam people — this evidence was about an oral tradition, commonly expressed in the Meriam Mir language where certain 'words and the fact of their being uttered take on added and special meaning…'.[12] Twenty-four Islanders gave evidence for the various plaintiffs, including Koiki Mabo who was the first witness. Koiki Mabo 'gave evidence-in-chief … over 10 days … recorded in 536 pages of transcript … and attract[ing] 289 objections from Queensland [the other party]'.[13] Bryan Keon-Cohen later observed that 'without Eddie Mabo there was no case … [he was] the indispensable bridge between the Anglo-Australian legal system and the traditional system of land-holding on the Murray Islands … It was he who pushed on, despite formidable personal difficulties and political opposition, to his (ultimately unfulfilled[14]) personal end; but to a community victory'.[15]

III Frameworks for Analysis of Language and Language Issues

Of course, we intuitively understand that language is more than a system of rules to communicate. Language allows us to do ongoing acts of identity, to create and change our identities so they have a level of fluidity, as individuals and collectively. Language is also an important part of fixed identities, such as a national identity, that arise from wider socio-political contexts. As Crump points out, we 'enact and negotiate both fixed and fluid identities'.[16] Many Indigenous peoples in Australia report challenges in resolving identities within an unreconciled Australia, best illustrated by the preferred name for 'Australia Day' from an Indigenous perspective commonly reported to be 'Invasion Day'.[17]

Even with the history of suppression of Indigenous languages since colonisation mentioned above, Indigenous languages are widely spoken across Australia. In 2011, 11.6 per cent of the Aboriginal and Torres Strait Islander population spoke an Indigenous language at home, with the highest proportion in the NT (64.7 per cent),

[11] This raised complex questions of admissibility of evidence that required resolution, as Bryan Keon-Cohen has set out. He makes the observation that Mabo is authority for more than recognition of native title, but that 'it is now inappropriate for any court, in dealing with … issues of fact, to make findings of fact based on an exclusion of traditional evidence …'. See Bryan A Keon-Cohen, 'Some problems of Proof: The Admissibility of Traditional evidence' in Margaret Anne Stephenson and Suri Mabo Ratnapala (eds), *Mabo, a judicial revolution — the Aboriginal land rights decision and its impact on Australian law* (University of Queensland Press, 1993) 195.
[12] Keon-Cohen, above n 11, 191.
[13] Ibid 200.
[14] Koiki Mabo's personal claims to 36 portions of land and sea all failed in being confirmed by the Supreme Court of Queensland, but other plaintiff's claims were confirmed so that the High Court could consider the legal issue of native title based on these. Ibid 198.
[15] Keon-Cohen, above n 5, 901.
[16] Alison Crump, 'Introducing LangCrit: Critical Language and Race Theory' (2014) 11(3) *Critical Inquiry in Language Studies* 207, 208 citing Emi Otsuji and Alastair Pennycook, 'Metrolingualism: Fixity, fluidity and language in flux' (2010) 7(3) *International Journal of Multilingualism* 240.
[17] SBS, 'Thousands turn up to 'Invasion Day' protests in major cities', *SBS News*, 26 January 2017 <www.sbs.com.au/news/article/2017/01/26/thousands-turn-invasion-day-protests-major-cities>.

followed by WA (14.5%), SA (12.2%) and Qld (7.8%).[18] For Aboriginal peoples in Australia, language is linked to identities that are connected to their country. As Sutton explains:

> All Indigenous language varieties in Australia are associated with particular areas of country in a way that is normally of substantial local cultural significance. These associations are perhaps universally construed within local traditions to be intrinsic rather than merely the outcome of historical accident. The basis of this intrinsic connection between language and country is usually reported, where it is reported, as being cosmogenic. That is, language-country nexus was founded for each area in the original creative period of the Dreaming, or soon after, often by regional Dreaming figures who changed language variety as they travelled across the known world and performed their marvels.[19]

Whether Indigenous people do or do not speak the language of their ancestors, Marcia Langton has explained that Aboriginal peoples define themselves through 'lineage and cultures that tie them to places and ways of life that existed long before colonisation'.[20] If this view is respected, as Langton points out 'then the power that nineteenth century race theories have had on our society through our *Constitution* and scores of legislative acts becomes null and void'.[21] In short, identity by associations with language groups, more specifically with language-owners,[22] rather than an identity connected to the unscientific colonial term 'race', is more akin to Aboriginal realities. For this reason, language support and renewal are of value beyond preserving a cultural artefact as a linguist observed about the revival of the Adnyamathanha language from SA[23] '[i]t was not the success in reviving the language … [i]t was success in reviving something far deeper than the language itself — that sense of worth in being Adnyamathanha, and in having something unique and infinitely worth hanging onto'.[24]

Of course, there are two Indigenous peoples in Australia, Aboriginal and Torres Strait Islander. Koiki Mabo was from the Torres Strait Islands, in the remote far north of Australia which consists of 274 small islands with some only four kilometres from Papua New Guinea. Koiki Mabo's colleague Noel Loos, who assisted him to write his autobiography,[25] described Koiki Mabo as a 'Meriam man from one of the most remote islands in the Torres Strait, Murray Island [Mir]', where he grew up with 'his own language and culture, [and] [i]nformally … discovered and learnt his kinship ties and

[18] Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators' (Report, Productivity Commission, 2016) app 2 (Figure 2.4 and Table A.4).
[19] Peter Sutton, 'Linguistic Evidence and Native Title Cases in Australia' in John Henderson and David Nash (eds) *Language in Native Title, Native Title Research Series* (Aboriginal Studies Press, 2002) 23.
[20] Marcia Langton, 'Indigenous exceptionalism and the constitutional race power' (Speech delivered at the Melbourne Writers Festival, Melbourne, 26 August 2012) 3.
[21] Ibid.
[22] Michael Walsh, 'Language Ownership: A Key Issue for Native Title' in John Henderson and David Nash (eds) *Language in Native Title, Native Title Research Series* (Aboriginal Studies Press, 2002) 233.
[23] A that time in the early 1990s only 20 speakers were reported, the 1996 census reported 125 people were speaking it at home. See Mobile Language Team, *About the Language: Adnyamathanha* (20 October 2017) <www.mobilelanguageteam.com.au/languages/about/adnyamathanha>.
[24] James Crawford, 'Endangered Native American Languages: What is To Be Done, and Why?' (1995) 19(1) *Bilingual Research Journal* 17, 35 citing Annette Schmidt, *The loss of Australia's Aboriginal language heritage* (Aboriginal Studies Press, 1990) 106.
[25] Noel Loos and Koiki Mabo, *Edward Koiki Mabo: His life and struggle for land rights* (University of Queensland Press, 1996).

his place in his Piadram Clan'.[26] Koiki Mabo's traditional language, Meriam Mir, is one of two dialects of the language of the eastern Torres Strait, and is linguistically related to languages of Papua New Guinea to the north.[27]

Australia had 250 distinct languages that subdivided into 600 dialects in the early 19th century.[28] The most recent and authoritative report card on the state of Indigenous languages in Australia is the 2014 Second National Indigenous Languages Survey. It found 'a complicated picture with ongoing decline but also some definite signs of recovery' and, alarmingly, that since 2005 spoken Australian Indigenous languages had dropped from 145 to 120, and only 13 were described as 'strong' compared to 18 in 2005.[29] Koiki Mabo's language, Meriam Mir, has been reported to have declining speakers, estimated to be 212 at the time of the 2006 census.[30] Overall, the scale of language loss since colonisation has been massive. Language loss world-wide is similarly massive, with Crawford reporting in 2000 that 'half of the estimated 6000 languages spoken on earth are "moribund"… they are spoken only by adults who no longer teach them to the next generation'.[31]

Like Australia, language loss is especially rapid in the Americas, and the latter is the subject of Crawford's insightful analysis. Crawford warns of the error of applying Darwinian terms to suggest 'that the "developed" [language] will survive and the "primitive" will go the way of the dinosaurs' or applying the 'murder vs suicide dichotomy' which suggests that speakers are to blame for language loss.[32] In Crawford's analysis of the decline of Navajo language speakers, he concludes that this outcome involves complex interactions of internal and external causes. However, he points out that at the heart of language loss is injustice: '[a]fter all, language death does not happen in privileged communities. It happens to the dispossessed and the disempowered, people who need their cultural resources to survive'.[33]

Crawford notes that 'for many non-indians, who tend to view linguistic diversity as a liability, a problem, rather than an asset, the value of these languages is not self-evident'.[34] But how language and linguistic issues are socio-politically framed determines views of language loss and relevant policies on language. Crawford summarises the main frameworks, which are useful for the later analysis of Australia's treatment of Indigenous languages, as: language as a problem, where language loss is viewed as a natural phenomenon and social and economic liabilities such as difficulties for institutions of the dominant culture are a focus; language as a resource, where language loss means closing of a unique window into language construction,

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[26] Noel Loos, 'Koiki Mabo: Mastering Two Cultures — A Personal Perspective' in Brian James Dalton (ed), *Lectures on North Queensland history* (James Cook University, 1996) 1.
[27] Australian Institute of Aboriginal and Torres Strait Islander Studies, *Austlang Australian Indigenous Languages Database*, 16 October 2017 <austlang.aiatsis.gov.au>.
[28] Joseph Lo Bianco, Organizing for Multilingualism — Ecological and Sociological Perspectives (Speech delivered at the Teachers of English to Speakers of Other Languages Symposium on Keeping Language Diversity Alive Symposium, Alice Springs, 9 July 2008) 11.
[29] Doug Marmion, Kazuko Obata and Jakelin Troy, 'Community, identity, wellbeing: the report of the Second National Indigenous Languages Survey' (Report, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2014).
[30] Australian Institute of Aboriginal and Torres Strait Islander Studies, *Austlang Australian Indigenous Languages Database*, 16 October 2017 <austlang.aiatsis.gov.au>.
[31] Crawford, above n 24, 17.
[32] Ibid 23, 26.
[33] Ibid 35.
[34] Ibid 32.

intellectual thinking and practical knowledge relevant to all humans and where a multi-lingual society is valued; and finally, language as a right, where language loss is diminishment of cultural pluralism and usually signifies a lack of justice, a breach of human rights.[35]

Building on the 'language as a right' and 'language as a resource' approaches, LangCrit has developed as a form of critical race theory, applied to language treatments and outcomes. It is described by Crump as a perspective that moves beyond considering language as a system, and considers how power and the law treat various languages differently, what values underpin these systems and realities and how this effects communities and individuals. LangCrit is of obvious relevance to Australia, given our history of suppression of Indigenous languages and racist laws and practices.[36]

Crump argues that policies that aim to control linguistic space, either by active laws or neglect, are 'intertwined with desires to maintain certain socially constructed hierarchies'.[37] In short, language is another dimension of intersectionality, that is one contributor among others such as race and gender, to inequality and discrimination. Language, like other qualities of an individual or group, are caught in hierarchies, including racial hierarchies. Such hierarchies operate systemically and unconsciously in contemporary societies, and are fed by and perpetuate legacies from the past when more overt discriminatory practices against languages were in place. Using the dominant language involves speakers in messages about these hierarchies. For example, in considering how whiteness continues to sit at the top of the hierarchy, DiAngelo notes the messages in English media and literature about the centrality of whiteness: 'history textbooks, historical representations and perspectives … in media and advertising … teachers, role models, heroes and heroines … religious iconography … Adam and Eve …'.[38]

LangCrit and Crawford's analysis of native American languages summarised above emphasise how different treatment and outcomes for languages come about due to power and socio-political frameworks, with language loss a signifier of the disempowerment of the language owners. These approaches are useful when considering laws and language issues in Australia in the following two sections of this paper.

IV LANGUAGE RIGHTS

Valuing 'critical human voices' is the fundamental basis of human rights, according to Romany and Chiu, who explain that '[t]hese voices … have truth value to the extent that they adequately reflect the identity of their speakers'.[39] Language, given its centrality to identity and social context, is surely a key to enabling and hearing critical voices. For this and other reasons language rights have been a long-standing part of the international framework for equality. The Charter of the United Nations states that 'human rights and fundamental freedoms should be encouraged and promoted without

[35] Ibid 32-35.
[36] See Heather McCrae and Garth Nettheim (eds), *Indigenous Legal Issues: Commentary & Materials* (Thomson Reuters, 2009).
[37] Crump, above n 16, 218.
[38] Robin DiAngelo, 'White Fragility' (2011) 3(3) *International Journal of Critical Pedagogy* 54, 63.
[39] Celina Romany and Joon-Beom Chu, 'Affirmative Action in International Human Rights Law: A critical Perspective of its Normative Assumptions' (2004) 36 *Connecticut Law Review* 831, 857.

distinction as to race, sex, language or religion'.[40] This is restated in the Universal Declaration of Human Rights,[41] and numerous international treaties and related documents reference language (some of which Australia has ratified).[42]

Most recently the Declaration on the Rights of Indigenous Peoples captures and clarifies Indigenous peoples' rights to their cultures and languages as set out in other human rights instruments.[43] In particular, Article 13 of *UNDRIP* states that:

> Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their … languages … and States shall take effective measures to ensure this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

The Commonwealth Parliament's Joint Committee on Human Rights (PJCHR),[44] which occupies a unique role in scrutinising federal laws and practices, has reinforced the importance of the *UNDRIP*. The PJCHR has stated that while the *UNDRIP* is not enshrined in domestic law, it is important in interpreting the conventions which the PJCHR is required to consider and so assessment of laws by PJCHR will refer to the *UNDRIP* 'where relevant'.[45] The view of the PJCHR is consistent with a widely held view that the *UNDRIP* re-states existing international treaty requirements and does not expand them.[46]

The *Racial Discrimination Act 1975* (Cth) ('*RDA*') implements domestically the *International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD*').[47] With the rejection by successive governments of national human rights legislation,[48] and the primacy that Commonwealth laws can have if there is an

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[40] *Charter of the United Nations* art 1(3).
[41] *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 2 ('*UDHR*').
[42] Human Rights Council, *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, UN Doc A/HRC/EMRIP/2012/3 (26 April 2012) ('*Expert Mechanism Report*'); Noelle Higgens, 'The Right to Equality and Non-Discrimination with Regard to Language' (2003) 10(1) *Murdoch University Electronic Journal of Law* 1.
[43] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 3–5, 13–15 ('*UNDRIP*').
[44] After the Rudd Labor government rejected a recommendation to enact human rights legislation, it established the PJCHR. Unlike the ACT, Victorian and UK legislation, scrutiny about human rights compliance at the federal level under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) is undertaken by the PJCHR, and the judiciary have no powers, for example, to issue a statement of incompatibility. The PJCHR is required to scrutinise laws against the rights and freedoms recognised by or declared by seven listed international instruments, including the *ICERD*.
[45] Parliamentary Joint Committee on Human Rights, 'Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Stronger Futures in the Northern Territory Act 2011 and related legislation' (Report No 11, Commonwealth of Australia, 2013) 36.
[46] Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' [2012] *Australian International Law Journal* 3; Mauro Barelli, 'Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead' (2012) 16(1) *International Journal of Human Rights* 1.
[47] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969). It was ratified by Australia in 1975.
[48] National Human Rights Consultation Secretariat, 'Consultation Committee Report' (Consultation Paper, Attorney-General's Department, 2009). The Rudd Labor Government rejected its recommendation to enact federal human rights legislation.

inconsistency with state/territory legislation under the *Australian Constitution* s 109, the *RDA* has a central role to play in recognising language rights and protecting against discrimination. Unlike other Australian federal anti-discrimination laws, the *RDA* provides a limited but unique equality guarantee regarding laws for 'persons of a particular race, colour or national or ethnic origin'.[49] The *RDA* also mirrors *ICERD*'s broad prohibition on discrimination.[50] Section 9(1A) of the *RDA* was inserted in 1990 to ensure that indirect discrimination, a seemingly neutral condition with a discriminatory effect, is unlawful. However, language is not mentioned specifically in ss 9 or 10 of the *RDA*, mirroring to the *ICERD* — although, note, domestic anti-discrimination case law has found that language can be associated with one of the grounds that are explicitly covered under the *RDA*.[51]

The point to be made here is that there has been little reported litigation under the *RDA* or other anti-discrimination legislation in Australia about discrimination against Indigenous peoples on the grounds of or involving language. This might be seen as an indication that such discrimination is no longer prevalent. However, the next section demonstrates that this is far from the reality. A hurdle in bringing discrimination cases is that there are significant problems with the *RDA*, just one of them being that language is not included as a ground for discrimination. The *RDA* is not a constitutional guarantee so can be suspended by the Australian Parliament and indeed this is what occurred in the case of the 'overtly racist' 2009 NT Emergency Intervention (NT intervention).[52] Furthermore, it is not always clear when the *RDA* applies, many provisions are overly complex, and indeed ineffective in the face of modern-day, less overt, forms of discrimination.[53] The *RDA* needs a careful and thorough overhaul to maintain its strengths and to better align it with international developments in equality law, including language rights. Law reform issues were well canvassed in a 2011 review of problems with Australia's federal anti-discrimination legislation undertaken by the Australian government to ensure that Australia complied better with its human rights

[49] *RDA* s 10. This ensured the protection of native title against discriminatory state legislation in *Mabo v Queensland [No 1]* (1988) 166 CLR 186 and later *Western Australia v Commonwealth* (1995) 183 CLR 373.

[50] *RDA* s 9. *ICERD* art 1 prohibits: 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect' of limiting equality in 'human rights and fundamental freedoms' in 'public life'.

[51] For example, the meaning of 'race' was considered in the context of disputes between Indigenous persons in *Williams v Tandanya Cultural Centre* (2001) 163 FLR 203. In that case, Driver FM found 'race' in the context of the fuller phrase that includes 'national or ethnic origins or descent' is a broad term, and that an indicator of membership of a race or of a particular people within a race may be 'language and other cultural distinctions': at 209. A further example is *Macabenta v Minister for Immigration & Multicultural Affairs* (1998) 90 FCR 202 where the Federal Court held that the phrase 'race, colour or national or ethnic origin' in s 10 of the *RDA* were intended to give added content and meaning to the word 'race' and 'capture the somewhat elusive concept of race' and the court went on to say that determining 'ethnic origin' lends itself readily to inquiries about whether there is a common language: at 209–210.

[52] James Anaya, *Observations of UN Special Rapporteur on the Rights of Indigenous People (2009)* as cited by the Law Council of Australia, *Submission to Senate Community Affairs Committee on Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009*, 27 August 2009, 5.

[53] See analysis of the *RDA* by Laura Beacroft, 'What does National Equality Law have to do with Closing the Gap?' (2017) 91 *Alternative Law Journal* 1 and in the education system by Loretta de Plevitz, 'Systemic Racism — The Hidden Barrier to Educational Success for Indigenous School Students' (2007) 51(1) *Australian Journal of Education* 54.

obligations.[54] Tellingly, language as an attribute for specific protection was not recommended for inclusion in the resulting Human Rights and Anti-Discrimination Bill 2012 ('Bill'), and while the Bill had some strengths it had many major deficiencies that required amendment.[55] In any case, the Abbott Coalition Government did not proceed with the Bill, similar to the fate of the previously recommended human rights legislation. This demonstrated again the lack of political will by successive Australian governments over the last 25 years to fix glaring gaps in federal equality law.

Given that the *RDA* mirrors the wording of the *ICERD*, international developments regarding language rights under the *ICERD* would seem highly relevant. Whilst *ICERD* does not specifically refer to language as mentioned above, General Recommendation 23 about Indigenous peoples issued by the Committee to Eliminate All Forms of Racial Discrimination (CERD), called on states to recognise '… indigenous distinct … language … as an enrichment of the State's cultural identity and to promote its preservation', and also to ensure 'effective participation in public life'.[56] Also, CERD has criticised prohibitions on the use of Indigenous peoples' languages.[57] However, the High Court recently found in *Maloney v The Queen* (2013) 252 CLR 168 ('*Maloney*') that post-treaty international developments (such as General Recommendations of CERD) were not required to be followed in the interpretation of the RDA. Further, *Gerhardy v Brown* (1985) 159 CLR 70 and more recently the *Maloney* decision, result in the *RDA* being judicially interpreted in such a way that any different treatment of Indigenous language owners and Indigenous language speakers would be likely to be found to be discriminatory (commonly referred to as applying a 'formal equality test' for discrimination[58]). Different treatment, even if necessary to achieve substantive equality, that is equality in outcomes, would then only be lawful if it meets the test for a 'special measure' under the *RDA* (s 8, *RDA*) which implies it is temporary given the wording of the CERD.[59] This ignores the reality that equality may require unique rights to be recognised, for example native title, called 'equity rights' by Reconciliation Australia.[60] Ensuring Indigenous peoples can speak their own languages has been

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[54] Attorney-General's Department, Consolidation of Commonwealth Anti-Discrimination Laws (Discussion Paper, Commonwealth Attorney-General's Department, September 2011).

[55] Some benefit for language rights for Indigenous people might have been gained from the recommended expansion of the current protected attributes under the *RDA* (such as colour, ethnicity or ethnic origin, race, and immigration status: *RDA* ss 5, 9(1)) to include 'social origin' as an attribute, defined by its ordinary meaning commonly understood to refer to a person's social status, family background and geographical origins. See Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 17(1)(r). For general comment about the Bill, see Attorney-General's Department, above n 54, submission 207 <aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/submissions>.

[56] General Recommendation XXIII: Indigenous Peoples, CERD/C, 51st sess, UN Doc A/52/18 (18 August 1997).

[57] See, eg, United Nations Committee on the Elimination of Racial Discrimination, 'Consideration of Reports submitted by State parties under Article 9 of the Convention' (Concluding Observations, UN Doc CERD/C/304/Add.113, 23 March 2001).

[58] See Heather McCrae and Garth Nettheim (eds) *Indigenous Legal Issues: Commentary & Materials* (Thomson Reuters, 2009) ch 9.

[59] *RDA s 8* and *ICERD* art 1(4). For analysis of how the special measures provision is 'stretched' in Australian jurisprudence see Jonathon Hunyor, 'Dancing with Strangers: Native Title and Australian Understandings of Race Discrimination' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2005) 63.

[60] Reconciliation Australia, *The State of Reconciliation in Australia — Our History, Our Story, Our Future* Reconciliation Australia Website 7 < https://www.reconciliation.org.au/wp-content/uploads/2016/02/State-of-Reconciliation-Report_SUMMARY.pdf>.

referred to by CERD as a fundamental right, akin to land rights.[61] However, Indigenous languages in Australia at best warrant temporary affirmative action programs under present law.[62] The jurisprudence on the *RDA* and human rights in Australia has been referred to as an example of 'intellectual isolation',[63] and the vacuum in human rights legislation a form of 'exceptionalism'[64] — the vacuum in equality law outlined above on language rights illustrates well this isolationism and exceptionalism, and underlines further the necessity of law reform.

The vacuum in language rights has effects beyond respecting languages and cultures. It undermines participation by Indigenous peoples in decision-making about their future and within the Australian democracy. Megan Davis has noted that the *UNDRIP* re-frames the existing Indigenous right to self-determination as a right to responsive democracy, where Indigenous peoples can equally determine their lives as a people 'within the state … without disrupting public institutions or the rule of law'.[65] At a practical level, the previous Indigenous Chair of Reconciliation Australia and now Senator, Pat Dodson, has described equality for his people as enabling a quality of life that is 'uniquely ours' and 'where we meet our obligations as citizens but where we are accommodated also as Aborigines'.[66] For these reasons, 'participation, engagement and consultation' in the affairs of the state by Indigenous peoples, and in affairs that particularly affect Indigenous peoples, emerge as central principles under the *UNDRIP* and for Indigenous equality generally.[67] The nature of participation required to achieve equality, under the *UNDRIP*, involving 'free, prior, informed consent (FPIC)', is not in all circumstances about obtaining consent as the author has explained elsewhere.[68] However, it does require a minimum standard of good faith,[69] which in turn requires genuine and effective responsiveness to language facts, rights and issues. Good language practices, such as the use of quality interpreters, are not all that is required, although this is essential and allows for co-production of solutions.[70] Enabling

[61] United Nations Committee on the Elimination of Racial Discrimination, 'Committee on Elimination of Racial Discrimination Discusses States' Obligation to Undertake Special Measures' (Press Release, UN Doc CERD/C/CHE/CO/6, 5 August 2008).

[62] In its 2016 Report to CERD, the Australian Government acknowledged that 'languages are essential to the wellbeing, culture and identity' of Indigenous peoples and confirmed its commitment to its current funding in order to preserve 'this important part of Australia's cultural heritage', see Department of Foreign Affairs and Trade, 'Australia's Combined 18th, 19th and 20th Reports Under the Convention for the Elimination of All Forms of Racial Discrimination, for the Reporting Period 2008–2014' (Report, Department of Foreign Affairs and Trade, 2 February 2016) 30 [145].

[63] James Spigelman, 'Rule of Law: Human Rights Protection' (Speech delivered at the 50th Anniversary of the Universal Declaration of Human Rights National Conference, Human Rights and Equal Opportunity Commission, Sydney, 10 December 1998); Simon Rice, 'Case note — Joan Monica Maloney v The Queen [2013] HCA 28' [2013] 8(7) *Indigenous Law Bulletin* 28, 29, 31.

[64] Professor Gillian Triggs, 'Free speech and human rights in Australia' (Speech delivered at the Free Speech 2014 Symposium, Ultimo, 7 August 2014) <www.humanrights.gov.au/news/speeches/free-speech-and-human-rights-australia>.

[65] Megan Davis 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439.

[66] Pat Dodson, 'Beyond the Mourning Gate – Dealing with Unfinished Business' (Speech delivered at the 12th Wentworth Lecture, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 22 May 2000) 14.

[67] Davis, above n 65.

[68] *UNDRIP* art 10. See analysis of FPIC by Beacroft, above n 53. See also Barelli, above n 46.

[69] See McLachlin CJ's account of the fundamentals of even the most minimum consultation in *Haida Nation v British Columbia (Minister of Forests)* [2004] SCC 73, [40], [45]–[46], [51] (McLachlin CJ).

[70] Janet Hunt, 'Engaging with Indigenous Australia — Exploring the Conditions for Effective Relationships with Aboriginal and Torres Strait Islander communities' (Issues Paper No 5, Closing the

Indigenous languages also allows unique practices that Indigenous peoples may employ for self-determination, offering 'tools to express indigenous collective juridical and political methodology and organization'.[71] On this point, an Indigenous person of Greenland explained that Indigenous approaches to civil society are relevant to the world: 'The world must learn from us; they may need our knowledge of sharing, respect for nature, and the care and security of the extended family and collective rights. It is now time for us to put our mark on the history of mankind'[72]

The Expert Panel in 2012 raised the profile on the relationship between language and equality, when it put forward a proposal to recognise Indigenous languages in the Australian Constitution. The Panel recommended new provisions in the Australian Constitution that acknowledged Indigenous languages as 'the original Australian languages, a part of our national heritage', albeit that the 'national language … is English'. [73] A specific acknowledgment of Indigenous languages similar to the recommendation of the Expert Panel, but not recognising English as the national language which had been controversial,[74] was included in two of the three options recommended for consideration in a referendum by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples in its Final Report.[75] Most recently the Uluru Statement called for the 'establishment of a First Nations Voice enshrined in the Constitution',[76] which would inevitably give more voice nationally to Indigenous language rights and issues.

Whatever the outcome of deliberations about the scope of constitutional recognition of Indigenous peoples, the framing of Indigenous languages as worthy of constitutional recognition by the Expert Panel is important. It presents a contrast to the lack of informed leadership on this subject by most Australian governments since Federation in 1901. Meanwhile our neighbour New Zealand, and other comparable nations such as Canada, have moved well beyond this debate and have recognised in law Indigenous language rights:

Gap Clearinghouse, October 2013) 6 citing Brenton Holmes, 'Citizens' engagement in policymaking and the design of the public services' (Research Paper No 1, Parliamentary Library, Parliament of Australia, 2012).

[71] *Expert Mechanism Report*, above n 42, 7–8.

[72] Henriette Rasmussen, 'Cultural Rights in Greenland' in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, 2009) 234.

[73] Expert Panel on Indigenous Constitutional Recognition, *Final Report of the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012) 133 recommendation 4.9.2.

[74] Alexander Reilly observes that the Expert Panel's recommendation, similar to recognition of minority languages generally, is aimed at 'recognising linguistic diversity, enriching the cultural life of the state, maintaining connections … and recognising language choice as a basic human right'. He argues that the recognition of English as the national language is problematic for a number of reasons, including the association of English with the colonisation of Indigenous peoples and the active suppression of Indigenous languages. See Alexander Reilly, 'Confusion of Tongues: Constitutional Recognition of Languages and language Rights' (2013) 41 *Australian Federal Law Review* 333, 335.

[75] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (2015) xii recommendation 5.

[76] Referendum Council, *Uluru Statement from the Heart* (19 June 2017) <www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF> (Viewed 21 October 2017); Daniel McKay, 'Uluru Statement: a quick guide' (Parliamentary Library, Parliament of Australia, 2017).

> Positive examples in this regard include the New Zealand Maori Language Act 1987, which recognizes the Maori language as an official language, …the Norwegian Constitution and Norwegian Sami Act, 1987, the Northwest Territories' Official Languages Act 2013, and the establishment of the Foundation of Indigenous Languages in Canada which developed draft legislation aimed at promoting and protecting indigenous languages…[and a recent initiative in NZ includes] development of the Google search engine site in the Maori language.[77]

Australia is an exception in that it has no federal laws recognising Indigenous languages, and has poor protections for language discrimination, in contrast with the legal situations in the comparable nations mentioned above. Recently the NSW government announced it will enact legislation to establish the first Centre for First Languages, in NSW, to better recognise and protect Indigenous Languages in NSW — this may be a step towards better recognition of communal intellectual property (see discussion below). However, it does not provide for enforceable rights in the face of discrimination.[78]

With this vacuum on Indigenous language rights, English is the de-facto national language in Australia. It is declared to be the 'national language' in the Values Statement for prospective visa holders as published by the Department of Immigration and Border Protection, and the Turnbull Coalition government has recently proposed that passing a tertiary-level English test be required for prospective citizens.[79]

While Australia exhibits exceptionalism in its equality law and human rights jurisprudence and in its lack of recognition of language rights, internationally there is a substantial framework for language rights. Henderson offers a useful categorisation of international language rights:

> [the first type is] essentially the rights to speak one's language with other speakers in private and in public…[t]he second type are rights which require the institutions of the wider community or state to provide for the use of the language. This type includes rights to an education in one's first language and rights to interpreters in legal proceedings. The third type are effectively communal intellectual property rights by which the holders of the rights can limit the use of a language by people and institutions deemed external to the language community.[80]

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[77] *Expert Mechanism Report*, above n 42, 12-13.

[78] Aboriginal Languages Bill 2017 (NSW). Note NSW anti-discrimination legislation like the *RDA* does not specifically include language as a ground for discrimination, but it does have wider grounds than the *RDA* ('race, colour, nationality, descent, ethnic or ethnoreligious background') and in some circumstances 'speaking in your own language at work or when you are studying' or 'an employer … [insisting] that you speak English fluently or without an accent' can be unlawful. See *Anti-Discrimination Act 1977* (NSW) s 4 (definition of 'race'); Anti-Discrimination Board of NSW, *Fact Sheet: Race Discrimination* (21 October 2017) New South Wales Department of Justice <antidiscrimination.justice.nsw.gov.au/Documents/Race_factsheet_Mar2017.pdf>.

[79] 'The English language, as the national language, is an important unifying element of Australian society'. See Department of Immigration and Border Protections, *Australian values statement* (23 October 2017) <border.gov.au/Trav/Life/Aust/living-in-australia-values-statement-long>. In 2017, the Turnbull Coalition government proposed an enhanced English language test for prospective migrants that requires a standard equivalent to that expected of university entrants, well above the average Australian's standard. ABC News, 'Fact check: Will the Government's new citizenship test demand a university-level standard of English?', *RMIT ABC Fact Check*, 29 June 2017 <abc.net.au/news/factcheck/2017-06-28/tony-burke-citizenship-test-university-level-english-dutton/8656754>.

[80] John Henderson, 'Language and Native title' in John Henderson and David Nash (eds) *Language in Native Title, Native Title Research Series* (Aboriginal Studies Press, 2002) 11.

How these three categories of language rights are recognised and implemented in Australia is considered in the next section.

V Implementation of Language Rights in Australia post-Mabo

A *Communal intellectual property*

Loss of language is in part a by-product of the absence of recognition of communal intellectual property rights and it also adversely impacts the transmission of communal intellectual property to future generations. Communal intellectual property rights have not fared well in Australia to date. As Henderson pointed out in 2002, communal intellectual property rights are not legally recognised in Australia, despite significant and ground-breaking work by Janke[81] and others to progress recognition. This contrasts with the approach of many other nations — the respect for communal knowledge elsewhere is perhaps illustrated by the well-established libraries of traditional knowledge in nations such as India. The *Mabo (No 2)* decision offered hope for better recognition of communal intellectual property rights, especially the judgment by Brennan J, as Puri argued in 1993.[82] However, the Native Title legislation does not provide statutory protection or recognition for such rights, and the courts in native title determinations have offered very limited recognition, which is confined to particular native title determinations as set out in more detail in the next sub-section. Concern about lack of recognition of communal intellectual property rights is not confined to native title holders, who are a minority of Indigenous peoples in Australia. Stoinoff and Roy point out that '[h]olders of cultural knowledge [in Australia] … are concerned [about] … losing traditional languages and customs through which the cultural knowledge is maintained (often through oral traditions)'.[83] Contemporary approaches to recognising Indigenous cultural and intellectual property rights beyond native title claims are well canvassed by Janke[84] and Stoianoff and Roy.[85] In brief, what is recommended is a statutory regime for recognition of the unique cultural and intellectual property rights in Australia, in line with advances internationally.

B *Native Title and Indigenous language recognition*

In the context of native title, how have language rights fared post-Mabo? Since *Mabo (No 2)* it has become common for evidence about language to be considered in determinations about a native title claim,[86] in particular to show continuity of the language owners since Crown sovereignty and the connection of the language owners

[81] Terri Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1998).
[82] Kamal Puri, 'Copyright Protection for Australian Aborigines in the Light of Mabo evidence' in Margaret Anne Stephenson and Suri Mabo Ratnapala (eds), *Mabo, a judicial revolution — The Aboriginal land rights decision and its impact on Australian law* (University of Queensland Press, 1993).
[83] Natalie Stoianoff and Alphana Roy, 'Indigenous Knowledge and Culture in Australia — The Case for Sui Generis Legislation' (2015) 41(3) *Monash University Law Review* 745, 775.
[84] Terri Janke, *New Tracks Response to Finding the Way* (Terri Janke, 2012).
[85] Stoianoff and Roy, above n 83.
[86] For an overview of linguistic evidence in native title claims see Henderson, above n 80.

to a particular area.[87] Henderson makes the important observation that that it is clear from the cases 'that the ability to speak or understand a traditional language is neither necessary not a sufficient condition for an individual's membership in a group of native title holders'.[88] The latter approach is in line with Langton's comment about the source of Indigenous identity being in lineage, mentioned above.

Some native title claims have included claims to a range of linguistic rights, ranging from 'quite general formulations regarding cultural knowledge to rights to the exclusive use of a language'.[89] These claims have had mixed success as Henderson's summary of key cases shows:

> In *Hayes v Northern Territory* [2000] FCA 671, Olney J determined that the native title that persisted in much of the area included a claimed right to 'manage the spiritual forces and to safeguard the cultural knowledge associated with the land and waters of their respective estates. … A similar right was found in *Yarmirr v Northern Territory* (1998) 82 FCR 533. The extent and substance of these rights is not detailed in the judgments. In *Ward* [1998] FCA 1478 [34], Lee J found that the Miriuwung-Gajerrong native title included the 'right to maintain, protect, and prevent misuse of cultural knowledge'. At appeal, the minority judgment by North J accepted this as a native title right on the basis that the cultural knowledge considered by the trial judge was 'intimately connected with the land' [*Western Australia v Ward* (2000) 99 FCR 316 [865]-[868]]. However, the two-judge majority rejected it as a native title right, [instead characterising it as] '… a personal right residing in the custodians of the cultural knowledge, independent of [native title] rights …' [*Western Australia v Ward* (2000) 99 FCR 316 [865]-[868]].[90]

Basten J found the appeal decision in *Ward* summarised above was 'infected by an erroneous understanding of the concept of native title', in that it is contrary to Brennan J's explanation of native title in *Mabo (No 2)*, and contrary to the High Court's recognition that the *RDA* can protect rights not found under domestic law.[91] Basten J argues that the decision in *Ward* effectively denies 'protection to a key element' of the connection the native title group has to the land or waters, and 'fails to recognise that native title may involve interests which are sui generis [ie unique] …'[92] He points out that the High Court authority that recognises the conduct of ceremony as a native title right allows the 'protection of cultural or spiritual knowledge' to be viewed as incidental to native title rights — however clearly the majority in the appeal court in *Ward* did not adopt this approach.[93]

C *Language Discrimination*

Discrimination is anything that unfairly disadvantages someone due to their characteristics or life circumstances. Australia has a long-history of discriminating overtly against Indigenous peoples, and discriminatory practices against Indigenous languages are intertwined with racist practices, as mentioned earlier. To understand the

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[87] Greg McIntyre and Kim Doohan, 'Labels, Language and Native Title Groups: The Miriuwung-Gajerrong Case' in John Henderson and David Nash (eds) *Language in Native Title, Native Title Research Series* (Aboriginal Studies Press, 2002) 203.
[88] Henderson, above n 80 citing *Ward v Western Australia* [1998] FCA 1478 (Lee J) ('*Ward*').
[89] Henderson, above n 80, 9.
[90] Henderson, above n 80, 9–10.
[91] John Basten, 'Recent Developments in Native Title Law and Practice: Issues for the High Court' (2002) 2(13) *Land, Rights, Laws: Issues of Native Title* 1, 5 citing *Mabo (No 2)* 175 CLR 1, 170 [6] (Brennan J). In reference to the *RDA*, citing *Mabo (No 1)* (1988) 166 CLR 186 and *Western Australia v Commonwealth* (1995) 183 CLR 373, 436–437 ('*Native Title Act Case*').
[92] Basten, above n 91, 5 citing *Mabo [No 2]* (1992) 175 CLR 1, 89 [5] (Deane and Gaudron JJ).
[93] Basten, above n 91, 5 citing *Wik Peoples v Queensland* (1996) 187 CLR 1, 169 [4] (Gummow J).

nature and consequences of this language discrimination, consider the painful evidence to an inquiry by one survivor of the stolen generations:

> I guess the most traumatic thing for me is that … you [the missionaries] forbad us to speak our own language and we had no communication with our family…. I realised later how much I'd missed of my culture … I met her [my mother] in 1968 … there wasn't a word we could say to each other. All the years that you wanted to ask this and ask that, there was no way we could ever regain that. It was like somebody came and stabbed me with a knife … I finally met [my mother] through an interpreter.[94]

Today deeply entrenched hidden systems in our society's structures and practices, in part legacies of past racist practices never adequately rejected, are the basis for discrimination today. Dealing with such discrimination, referred to here as systemic discrimination, is a contemporary challenge. Tackling it requires better understanding and identification of this type of discrimination, coupled with more effective remedies than a complaints-based anti-discrimination system can provide. This section provides an overview of the evidence about systemic discrimination against Indigenous language speakers in four key areas: education, consultation about Indigenous-specific government initiatives, voting and engagement with the criminal justice system.

Consider the treatment of bilingual education for remote Indigenous peoples in the NT. Shortly after the announcement of the 2007 NT intervention, which aimed over time to 'normalise' Indigenous people in the Northern Territory, the NT government effectively terminated bilingual education in remote NT schools.[95] In 2008 the NT Minister for Education announced a decision to 'abolish bilingual education in NT schools in order to devote the first four hours each day to English only. The plan was formulated in haste over a few days, as the Minister admitted'.[96] Jane Simpson, Jo Caffery, and Patrick McConnell explain bilingual education in the NT as follows:

> Many Indigenous children growing up in the NT live in remote communities where the language they hear at home, in the community and the playground is not SAE [standard Australian English], but rather an Indigenous language, an English-based creole or a mixed language. … However it is rare for children in remote Indigenous communities to be taught by teachers (Indigenous or non-Indigenous) who are trained in methods for teaching SAE to children who speak a different language …
>
> In the Northern Territory, the terms 'bilingual education' or 'Two-Way' learning are used for 'mother tongue medium' programs, that is, programs where children are taught for the first few years of school by teachers, or teams of teachers, who use the children's home language to teach them, along with explicit teaching of oral SAE. Teachers, materials and curricula for these programs have been supported since the Federal Government … introduced bilingual education programs in 1974, in line with Indigenous community calls for 'Two-Way', not 'One-Way', education.[97]

Tom Calma, the then Social Justice Commissioner, commented on the 'dramatic back flip' of the NT government in this decision to stop bilingual education.[98] Reilly points out that this decision was 'widely criticised', occurred without any consultation with

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[94] *Stolen Generations Report*, above n 3, F from Ernabella, Confidential evidence 305, South Australia.
[95] Mark Colvin, Interview with Mal Brough, Minister for Families, Community Services and Indigenous Affairs (Television Interview, 21 June 2007) <abc.net.au/pm/content/2007/s1958440.htm>.
[96] Jane Simpson, Jo Caffery and Patrick McConnell, 'Gaps in Australia's Indigenous Language Policy: Dismantling bilingual education in the Northern Territory' (Research Discussion Paper No 24, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2009) 28.
[97] Simpson, Caffery and McConnell, above n 96, 8.
[98] Tom Calma, 'A human rights agenda for the Northern Territory' (Speech delivered at the annual Eric Johnston lecture, Australian Human Rights Commission Sydney, 17 November 2008) 12.

affected communities and parents, and was 'contrary to existing government policy support for bilingual and bicultural education'.[99] In 2010 the then Special Rapporteur noted with concern that:

> [t]here are very few examples of Aboriginal children being taught in their own languages [in Australia]. Of particular concern is … that, as of January 2009, the Northern Territory government requires the school activities be conducted in English for the first four hours of each school day[100]

A 2012 House of Representatives inquiry acknowledged that the NT Government had reversed this controversial decision, and went on to confirm its support for quality bilingual education, noting that it required 'thorough community consultation' and to be 'sufficiently resourced and supported by specifically trained language teachers and the bureaucracy'.[101] This is in line with international research on best practice in education.[102]

What is of concern here is that the decision by the NT Government to stop bilingual education, albeit now overturned, was not only contrary to evidence and taken without any consultation, but was officially stated to be a response to 'poor … literacy and numeracy results'.[103] In this manner it problematised the role of Indigenous languages in schooling, rather than acknowledging their role as a national cultural asset and the value of bilingualism/multilingualism to children. This demonstrates the 'language-as-problem' framework that governments commonly exhibit in Australia. As Crawford points out this results in education policies that '… place the rapid acquisition of English ahead of other academic goals. By contrast, a language-as-resource approach focuses on student's language ability in a minority tongue, and 'tends to support a late-exit enrichment model that continues native-language instruction after students are proficient in English'.[104]

Consider another example of discrimination against Indigenous language speakers — the experience of consultation by Indigenous language speakers outside the native title and land rights context. In contrast to native title and land rights contexts, there are no legislative schemes to guide participation processes in social policy initiatives of government. The NT intervention and the later social policy initiatives it morphed into did not adequately consider language rights or issues in their development or roll-out. Rosalie Kunoth-Monk's experience of the intervention in a remote community where English is not the usual first language was akin to a military invasion, which illustrates just how poorly the NT intervention was communicated to its Indigenous beneficiaries:

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[99] Reilly, above n 74, 356.
[100] James Anya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/15/37/Add 4 (1 June 2010) 11 [36].
[101] Commonwealth, *Our Land Our Languages: Inquiry into language learning in Indigenous communities by the Standing Committee on Aboriginal and Torres Strait Islander Affairs*, Parl Paper (2012) 118–120
[102] *Expert Mechanism Report*, above n 42.
[103] Simpson, Caffery and McConnell, above n 96, 28.
[104] James Crawford, 'Language Politics in the U.S.A.: The Paradox of Bilingual Education' (1998) 25(3) *Social Justice* 73, 86.

> We live in terror of our languages, our ceremonies and our land being taken off us right at this time in our history. … My recollection of the NT emergency intervention in my home community Urapuntja, commonly known as Utopia, was the day that soldiers in uniform, the police and public servants arrived and we were ushered up to the basketball stadium and we were told that we were now under the NT emergency intervention … We don't have access to newspapers, a lot of us, we don't have access to TV, a lot of us were going along our normal way, living at home, just doing the normal everyday things but on that day that they landed it was incredible … We really thought we were going to be rounded up and taken.[105]

Further consultations by the federal government were undertaken when the NT intervention was redesigned in 2009, and again further consultations occurred when the 2009 redesigned NT intervention was replaced by the 2011 Stronger Futures package. Both of these further consultations have been criticised for being flawed in various ways, including absence of interpreters, as outlined below. The former Special Rapporteur noted in 2010 that the Australian Government advised that 'the views expressed through the consultations were a significant factor in developing the reforms' and further that that it had met the requirements of FPIC under the UNDIP in that it had 'consulted extensively and in good faith'.[106] But the former Special Rapporteur concluded otherwise: '[He noted that he had] received reports alleging that … there often was an absence of NT intervention interpreters or adequate explanation of NT intervention measures …]'[107] A 2009 review of the consultations by the Jumbunna Indigenous House of Learning was also highly critical of the consultations, finding deficiencies in the way it was conducted, including 'an absence of interpreters'.[108] Of most concern, the authors of the Jumbunna Report raised that the consultations were done only to limit legal challenges.[109]

For the 2011 Stronger Futures initiative, similar to the NT intervention redesign, large-scale consultation occurred. The consultations which accompanied the Stronger Futures package were again assessed as deficient by the Jumbunna Indigenous House of Learning, when measured against the Australian Government's own handbook which provides whole-of-government guidance about consultation.[110] Again, there was a lack of interpreters, and again the most concerning criticism was that the consultations were 'tokenistic', and not conducted in good faith but done to avoid legal challenge.[111]

The absence of adequate legal safeguards to ensure there is effective consultation when major social policy initiatives target Indigenous peoples, and the poor practices that can be associated with discretionary consultations undertaken by governments as outlined above, leaves Indigenous peoples in Australia in an exceptionally vulnerable position. The concern here is not just about the practical impacts on the effectiveness of a specific initiative. The normative message is that the voices of the intended Indigenous

[105] Rosalie Kunoth-Monks, 'Reflections on the Intervention: Quotes made between 2012 and 2014' in Rosie Scott and Anita Heiss (eds), *The Intervention: An Anthology* (Concerned Australians, 2015) 14–15.
[106] Anya, above n 100, 37 [48].
[107] Ibid 34 [32].
[108] Alastair Nicholson et al, 'Listening but not Hearing: A response to the NTER Stronger Futures Consultations June to August 2011' (Research Report, Jumbunna Indigenous House of Learning, University of Technology Sydney, 8 March 2012) 9 [38].
[109] Nicholson et al, above n 108, 4 [9]–[10], 18 [79].
[110] Office of Best Practice Regulation, 'Best Practice Regulation Handbook' (Handbook, Productivity Commission, August 2007) <regulationbodyofknowledge.org/wp-content/uploads/2013/03/AustralianGovernment_Best_Practice_Regulation.pdf>.
[111] Nicholson et al, above n 108, 19 [18]–[19], 20 [22], 21 [24].

beneficiaries and Indigenous voices generally are not worthy of being heard. By contrast, in a Guide for public authorities, developed by an arm of the United Nations to implement language rights of minorities, implementing language rights was presented as key to access to and quality in public services, and achieving equality. It was explained that the principle underpinning implementing language rights in many countries is 'proportionality':

> [I]t depends largely, though not exclusively, on the number and concentration of speakers. This will determine the extent and area where minority languages will be used by the relevant authorities as being reasonable and practicable … [for example] [i]n Canada, what is reasonable or practicable for either official language [English and French] to be used … is generally deemed to be at least 5% or more of the population … Other public services are provided where there are sufficient concentrations of Indigenous peoples (Cree, Inuktitut, Micmac, etc …).[112]

Other systemic discrimination based on language is perpetuated in the absence of language recognition, and human rights legislation, in Australia. Today it is estimated that 17 per cent of Aboriginal and Torres Strait Island people do not speak English well or at all.[113] Yet Australia's government-supported translating and interpreting service, which dates from the 1940s and was a world first in multilingual telephone interpreting services,[114] has never offered Indigenous language services.[115] The first interpreting services for Indigenous speakers was set up in the NT after a trial in 2000,[116] but language services for Indigenous peoples remain 'inadequate, particularly in remote communities'.[117]

Interpreters to assist Indigenous peoples with voting reportedly remains an ad hoc practice in state and federal elections, discouraging Indigenous people from voting, according to a member of the WA Parliament.[118] This omission is of serious concern, undermines Australia's compliance with various international treaties,[119] and it occurs despite governments expressing commitment to full enrolment of Indigenous people.[120] Full enrolment is clearly not a genuine priority of governments — in the Northern

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[112] Office of the United Nations High Commissioner for Human Rights, 'Language Rights of Linguistic Minorities: Practical Guide for Implementation' (Guidebook, 2013) 22, 24.
[113] Australian Bureau of Statistics, 'Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians' (Key Findings No 2076.0, 27 November 2012) <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2076.0main+features902011>.
[114] Reilly, above n 74, 349.
[115] Department of Immigration and Border Protection, *History of TIS* (23 October 2017) Telephone Interpreter Service (TIS) <tisnational.gov.au/en/About-TIS-National/History-of-TIS-National>.
[116] Barbara Weis, 'Northern Territory Aboriginal Interpreter Service' [2001] *Indigenous Law Bulletin* 41.
[117] Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Our Land, Our Languages, Our Land — Language Learning in Indigenous Communities* (2012) 167.
[118] Joint Standing Committee on Electoral Matters, Parliament of Australia, *Civics and Electoral Education* (2017) 104 [5.66].
[119] See, eg, *ICERD* art 5(c).
[120] In 2007 the Commonwealth Parliament's Joint Standing Committee on Electoral Matters of the Commonwealth Parliament suggested strategies to overcome the higher than average proportion of Indigenous people not voting and the high rates of informal voting. See Joint Standing Committee on Electoral Matters, above n 118, 85 [5.1], 106 [5.74]. In response to this systemic discrimination, as part of the 'Closing the Gap' strategy the Australian Government since 2009 has funded better participation of Indigenous peoples in elections through the Indigenous Electoral Participation Program. See Anne Markiewicz and Ian Patrick, Indigenous Electoral Participation Program. Final Evaluation Report Volume 1 Report No 1, Australian Electoral Commission, September 2012).

Territory where the Indigenous vote can determine which party governs,[121] the Australian Electoral Commission estimated just before the 2016 NT election that only half of Indigenous people were enrolled to vote.[122] Better practices include in the US, where a linguistic population of 5% or more requires the state to use the minority language in all voting materials including information and ballots, and to provide oral assistance.[123]

The limited or non-existent Indigenous interpreting services is particularly problematic in the criminal justice system. There is considerable international law on the right for a fair trial, and *ICERD* explicitly provides for the 'right to equal treatment before … all … organs administering justice'.[124] Given the limited interpreting and translation services it is logical that transgressions of basic rights of Indigenous person in the criminal justice system occur — a recent WA case, where a conviction of an Indigenous person who had no interpreter at trial was quashed, is just one example of this.[125] Even where some interpreter services were available, communication between police and Indigenous persons and in the conduct of police interviews has been identified as an ongoing problem by the WA Equal Opportunity Commission in 2010.[126] In contrast, in some Canadian circuit courts hearings in criminal cases and some civil cases are 'entirely or partially in the indigenous Cree language … [and in other areas] [p]roceedings must also be in other languages such as Inukitut … because of the size of these linguistic communities'.[127]

The brief case studies above lead to a conclusion that there is systemic discrimination and limited recognition, if any, of Indigenous language rights across Australia, in key areas such as education, consultation on major Indigenous-specific government initiatives, voting and the criminal justice system. Since 2002 the Productivity Commission has prepared regular independent reports for all governments in Australia, the Overcoming Disadvantage Report, on progress against agreed indicators including

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[121] Ella Archibald-Binge, 'Indigenous vote threatens to unseat Liberals in NT election' *SBS NITV* (online), 25 August 2016 <sbs.com.au/nitv/article/2016/08/25/indigenous-vote-threatens-unseat-liberals-nt-election>.

[122] Felicity James, 'Election 2016: Half of NT's Indigenous population not enrolled to vote, electoral commission says', *ABC News* (online), 27 May 2016 <abc.net.au/news/2016-05-25/half-indigenous-people-in-nt-not-enrolled-to-vote-aec-says/7446416>.

[123] Office of the United Nations High Commissioner for Human Rights, 'Language Rights of Linguistic Minorities: Practical Guide for Implementation' (Guidebook, 2013) 34.

[124] *ICERD* art 5(a). See also International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 14, 26 ('*ICCPR*').

[125] Calla Wahlquist, 'Wrongful conviction of Indigenous man sparks calls for interpreter funding' *The Guardian* (online), 13 April 2017 <theguardian.com/australia-news/2017/apr/13/wrongful-conviction-of-indigenous-man-sparks-calls-for-interpreter-funding>; *Gibson v Western Australia* [2017] WASCA 141, [200]. For early research into the unfairness of not taking into account language in proceedings with Indigenous peoples, see Diana Eades, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A handbook for Legal Practitioners* (Queensland Law Society, 1992).

[126] It found that 'an awareness raising strategy is required to educate service providers on the communication difficulties confronting Indigenous people', and 'linguistic issues … need to be understood by service providers … [such as] [o]ften Aboriginal people will not understand abstract concepts ... silences … can be interpreted by non-Aboriginal people as guilt whereas from an Aboriginal perspective there may be a cultural reason for not speaking about an issue … [and] … there are large gaps relating to technical terminology': Equal Opportunity Commission, 'Indigenous Interpreting Service. Is there a need?' (Report, Western Australia Department of Indigenous Affairs, 2010) 19, 26–27.

[127] Office of the United Nations High Commissioner for Human Rights, 'Language Rights of Linguistic Minorities: Practical Guide for Implementation' (Guidebook, 2013) 27–28.

early child development, education and training, health, economic participation, home environment, and community safety. However, the reports do not monitor discrimination, including language discrimination, against Indigenous peoples. They problematise Indigenous language, present it as a liability rather than a resource, as this extract from the 2016 report illustrates:

> Although language revitalisation and maintenance is crucial to preserving and strengthening traditional culture and people's identity and wellbeing …, a lack of proficiency in English can create barriers to education … employment … and access to services … The indicator on engagement with services … includes information on difficulty understanding, or being understood by, service providers.[128]

The 2017 Closing the Gap Report by Prime Minister Malcolm Turnbull is the ninth and reports that the Overcoming Disadvantage initiative is only on track to meet one of its seven targets.[129] It is widely agreed that progress hinges on reframing initiatives to overcome disadvantage, but what sort of reframing is required? Such initiatives commonly problematise Indigenous peoples as just a population of disadvantaged persons who must catch up with other Australians, for example, to learn English younger, faster and better. Indigenous peoples' lifestyles need to be 'normalised', according to Mal Brough, the then Minster for Indigenous Affairs in the Howard Coalition Government who led the NT intervention.[130] As Professor Harry Blagg says, if Indigenous peoples are just suffering disadvantage then why are they so 'stubbornly resistant to policies and practices founded in … social inclusion'.[131] Success rests with 'a fundamental shift in the relationship between Aboriginal and non-aboriginal societies', and 'being in step with Indigenous realities'.[132] A former Aboriginal and Torres Strait Social Justice Commissioner summed up the reasons for the limited progress in 'Closing the Gap' initiatives as the 'chaotic and inconsistent' approaches of governments coupled with the lack of engagement with the intended Indigenous beneficiaries.[133] Considering language issues in Closing the Gap, a 2009 review by the Commonwealth Ombudsman found that 'most [federal] agencies lack a unified and consistent approach to the use of language interpreters', that interpreter services advise they are under-utilised by government agencies, and recommended better guidance be provided.[134] A 2016 follow-up report by the Ombudsman found little progress had been made and recommended a whole-of-government response.[135] Little change in practices will occur until Indigenous languages are reframed as resources and rights, indivisible from culture, by our political leaders, and laws that reflect this recognition are enacted.

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[128] Steering Committee for the Review of Government Service Provision, 'Overcoming Indigenous Disadvantage: Key Indicators 2016' (Report, Productivity Commission, 2016) app 2 Aboriginal and Torres Strait Islander populations and language use.
[129] Department of Prime Minister and Cabinet, 'Prime Minister's Report 2017: Closing the Gap' (Report, Commonwealth, 23 October 2017).
[130] Peter Gale, 'Rights, responsibilities, and resistance: Legal discourse and intervention legislation in the Northern Territory in Australia' (2016) 209 *Semiotica* 167, 171.
[131] Harry Blagg, 'Journeys outside the comfort zone: Doing research in the Aboriginal domain' in Lorana Bartels and Kelly Richards (eds) *Qualitative Criminology — Stories from the field* (Hawkins Press, 2011) 144.
[132] Ibid 151.
[133] Australian Human Rights Commission, 'Annual Report 2014-2015' (Report, Australian Human Rights Commission, 12 October 2015) 14.
[134] Commonwealth Ombudsman, 'Talking in Language: Indigenous language interpreters and government communication' (Report No 05/2011, April 2011) 5, 19.
[135] Commonwealth Ombudsman, 'Ombudsman report recommends measures to improve access to Indigenous language interpreters' (Media Release, 22 December 2016).

As part of Closing the Gap, a small overdue step is to include monitoring of progress in respecting and recognising language rights and dealing with language discrimination in its framework.

VI Conclusion

The paper began by considering how central the Meriam Mir language was to *Mabo (No 2)*. The Mabo litigation provides a case-study in why language, language loss and better recognition of language rights matter. Australia's treatment of Indigenous languages today is to provide, at best, limited services on an ad hoc basis to support Indigenous languages as rare cultural artefacts. At worst, language treatment continues to be discriminatory and assimilationist in its effects – as the examples in the education system, in consultation about Indigenous-specific initiatives, the electoral system and in the criminal justice system outlined in this paper illustrate. This result is a product of explicit and implicit socio-political frameworks where Indigenous languages are viewed as problems, or as a feature of nature that is inevitably going to become extinct. Native title has opened a window for language recognition in some circumstances for some native title holders, which has been transformational in practice for some native title holders and symbolically transformational for Australia. However, the wider context for Indigenous languages and recognition of Indigenous language rights has not in practice been transformed by *Mabo (No 2)*.

An advantage to Australia being so behind comparable nations, in respectful treatments and recognition of Indigenous languages, is that the way forward is not technically elusive — it is well set out in international law and practices, well established initiatives in comparable nations such as NZ and Canada, and, indeed, in the expert reviews and research that have occurred in Australia over the last 25 years, as this paper outlines. But, if socio-political discourse and forces that problematise Indigenous difference and Indigenous languages continue to dominate, or remain unchallenged, the status quo for Indigenous languages will be hard to shift. The status quo means more rapid loss of Indigenous languages. Shifting to a view of Indigenous languages as resources and rights that are essential to overcoming disadvantage, is the challenge today.

Our political leaders of various political persuasions over the last 25 years since *Mabo (No 2)* have let us all down each time they have turned away from fixing equality laws in Australia. Law reforms outlined in this paper are required to provide a better basis for recognition of Indigenous languages, and a very pressing issue is law reform to prevent discrimination against Indigenous language speakers. An achievable step forward now, for governments to act on, is to include improved indicators in the overcoming disadvantage framework. There should be indicators that monitor progress in overcoming discrimination, including overcoming discrimination against Indigenous language speakers. Such indicators should be informed by a view that Indigenous languages are precious and empowering resources for Indigenous peoples, and indeed all Australians and all earth's citizens.