

Recent Developments in Education Law in New Zealand

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Abstract

The Education Act 1989 reformed educational administration in New Zealand. The major change to primary and secondary education was the devolution of power to locally-elected school boards so as to allow community-responsive schools. But the imposition of national guidelines as to curriculum, as well as the obvious need to observe the general law of the land, has tended toward a certain uniformity in schools rather than diversity. This should be no surprise. National standards ought to apply in local school communities on matters such as setting the basic curriculum, and in teachers' and students' rights. Recent legal controversies illustrate the point. These include disputes over school zoning, suspensions and expulsions, the treatment of minority (particularly Maori) culture and religion, and school rules about personal appearance and dress. In tertiary education an emerging controversy is so-called 'affirmative action'. A recent case has reminded institutions that their preference schemes for minorities must comply with the law.

Introduction

The last few years in New Zealand have seen 'education law' emerge as a field of legal practice and research. A small field, to be sure, but one which is rapidly expanding and has its unique set of concerns. Significantly, some lawyers now claim specialty in the area, law students are taking on education law issues for research papers, and there has been a number of seminars on the subject for lawyers and educationalists, two of which have resulted in small books *Education and the Law* (1993) and *School Discipline and Students' Rights* (1996), both Legal Research Foundation, Auckland).

Like 'medical law', 'immigration law' and 'commercial law', education law turns out to be simply the application of general legal principles to a particular field of endeavour, coupled with the interpretation of relevant legislation. That said, just as medical law encompasses fundamental issues of life and death, education law stakes a claim to important social policy issues of its own. How, for example, are we to treat students in schools? How do we reconcile their rights with schools' powers and responsibilities? What type of affirmative action in university admissions, if any, is consistent with equality and anti-discrimination law? How should the education system at all levels reckon with the increasing linguistic, religious and cultural pluralism in our society? Should we move to school vouchers to permit the use of public money for private schools? There have been interesting developments in many of these areas.

This survey cannot be confined merely to judicial decisions about education. Recourse to litigation continues to be uncommon in education disputes. For a start, New Zealand's no-fault accident compensation scheme means that even physical injuries to students and staff arising from the negligence of educational authorities do not lead to causes of action for damages. And many other education law issues - disputes over expulsions and the legality of school rules and practices, for example - simply do not involve sufficient sums of money to make litigation worthwhile.

But the scarcity of litigation in ordinary courts does not, of course, mean that there is no 'education law'. The law of education necessarily permeates the decisions of principals, school boards, and their advisers, not to mention the increasing scrutiny to which unpopular school decisions are subjected by commentators both inside and outside school communities. And the modern proliferation of specialist tribunals and agencies has created different forums for redress of educational grievances. Some matters now fall into the jurisdiction of the Privacy Commission or the Human Rights Commission, and both of these agencies are cheaper and sometimes quicker alternatives to courts, especially where mediated solutions are found. In addition, institutions such as the Ombudsman's Office and the Commissioner for Children may be called into educational disputes and are sometimes influential in their resolution. Education law incorporates the determinations of these bodies as well.

The following survey emphasises primary and secondary levels of education, although the section on affirmative action is relevant mainly to tertiary institutions.

The Legislative Background: the Education Reformation of 1989

The foundation of recent developments is the major reformation of education administration under the Education Act 1989. The then Labour Government had earlier commissioned a Task Force to review administration of education. The major theme of the resulting report (*Administering for Excellence* (1988), or 'the Picot Report', after its author) was that there should be a devolution of authority from the Department of Education to locally-appointed school boards operating individual schools within a set of broadly defined national objectives. The Government then issued a paper entitled *Tomorrow's Schools - the Reform of Education Administration in New Zealand* (1988) which embraced this theme. After a short period for public submissions, a bill was introduced into Parliament which became the Education Act 1989. (That Act must now be read together with the Education Act 1964, parts of which remain in force but most of which has been superseded.) Some would say that the legislation as ultimately enacted has reduced the degree of local autonomy and community empowerment envisaged by the Picot Report (Dale, 1992). But, even so, the framework of educational administration has undoubtedly been changed in fundamental respects.

For primary and secondary education, the major change is that control and management of schools now lies with a board of trustees elected by the school community. Each public school has its own board. Boards of trustees employ teachers and must operate their school in accordance with a 'charter'. These charters, a key feature of the new regime, were to be developed by each

new school board upon its election, after community consultation. Charters amount to a statement of a local school's educational objectives. There are, however, compulsory elements which all charters are deemed by the legislation to contain, and so the opportunity for significant local variation is somewhat reduced.

A corollary of the devolution to local areas was that the need for centralised administration diminished. A new and slimmer Ministry of Education now confines itself largely to the formulation of national education policy and advice to the Minister. Other national functions were devolved by the 1989 Act to new public entities: the New Zealand Qualifications Authority was created 'to establish a consistent approach to the recognition of qualifications in academic and vocational areas' (s 247), and a Chief Review Officer is empowered to review the performance of educational institutions. Most other functions now lie with school boards.

While such a regime makes for a certain amount of local control it can also entail much simultaneous reinventing of wheels by individual school boards around the country. Each must formulate its own school policies on matters falling within the broad mandate of 'control and management' of its school. National standards imposed by or under the Education Act and other legislation will, however, necessarily dictate much school policy and practice. And some recent developments described below will highlight how national (and sometimes even international) standards may be invoked to trump community-based initiatives or to seek changes to school practices at the instance of aggrieved minorities. On reflection, this is no great surprise. The community as a whole would not tolerate individuality in school character if carried to the point where national standards and aspirations are not met. For a start, the basic principles of fairness and natural justice obviously know no local boundaries. And fundamental matters of curriculum choice are necessarily dictated by national interest and national guidelines, though there remains room for variation in peripheral matters and in curriculum implementation.

In hindsight the community empowerment aspect of the new education regime was probably somewhat overstated. One early commentator described the regime as conferring 'responsibility without power' on school boards (Browning, 1993). There is truth in this. It is particularly illustrated in teachers' pay disputes leading to strikes, where school boards as employers come to bear some of the parental dissatisfaction yet are powerless to break the impasse because wage levels are determined nationally. And their duties as employers and managers requires school boards to seriously consider withholding pay for striking teachers even when such an action sends signals of being on the 'Government side'.

Tensions between national standards and local control are also to be found in a variety of disciplinary matters and curriculum decisions. These issues are best left to arise in the discussion of particular education law matters which now follows.

Control and Management of Schools: Who is in Control and in Respect of What?

School boards of trustees are elected by the school community every three years. Since the 'Tomorrow's Schools' regime began many schools have reported varying degrees of conflict between boards of trustees and school principals. There have been some celebrated employment disputes which have been extremely costly to schools in morale and money (Towner, 1993; Hodge, 1993). In psychological terms it is not difficult to imagine how these conflicts can arise. School trustees are likely to be enthusiastic and often able volunteers for whom the running of the school, though important, is not their central concern between board meetings. Principals, on the other hand, have made their career in education. They are in their schools everyday and must live with the consequences of board decisions. When conflict arises over whether a matter properly falls into the domain of the school principal or school board, only limited assistance is gained from the words of the Act.

Power for boards of trustees to operate their school is conferred by s 75 of the Act:

s75 Boards to control management of schools - Except to the extent that any enactment or the general law of New Zealand provides otherwise, a school board has complete discretion to control the management of the school as it thinks fit.

Principals' powers are put this way:

s76 Principals -

- (1) A school's principal is the Board's chief executive in relation to the school's control and management.
- (2) Except to the extent that any enactment or the general law of New Zealand provides otherwise, the principal-
 - (a) shall comply with the Board's general policy directions; and
 - (b) Subject to paragraph (a) of this subsection, has complete discretion to manage as the principal thinks fit the school's day to day administration.

Taking ss 75 and 76 together the implication is that school boards are to determine policy. They 'control the management' rather than 'manage'. It is the principal who manages. This subtle distinction does not make for a bright line but it is idle to look for any form of wording which would make the matter much clearer.

Note that the powers of principals and boards are expressly subordinated to other legislation as well as 'the general law of New Zealand', the latter expression plainly meaning the common law. This is significant, there is important new legislation in New Zealand on human rights which is necessarily expressed in broad and uncontextualised terms - the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 and the Privacy Act 1993. These enactments

confer on all persons including students a set of abstract rights including ‘freedom of expression’, ‘natural justice’, ‘freedom from discrimination’, and the right to information privacy. The number of school decisions and actions which interfere, to some degree, with these rights and others in the ‘rights legislation’ is likely to be large. Examples are discussed below. The present point is that the very elasticity of some of the critical concepts - ‘freedom of expression’, ‘unreasonable search and seizure’, ‘discrimination’, and so on - makes for much uncertainty. Much of the academic writing in the education law field is an attempt to sketch out the extent of school powers in making and enforcing rules, given the existence of student rights affirmed in other legislation (and, indeed, given the right to free public education affirmed by the Education Act itself). Underlying resolution of all these issues is the broader question of the role of courts in reviewing the conduct of elected school boards.

Judicial Review of School Decisions Under the Education Act 1989

Because schools must derive all their coercive power over students from the Education Act, their decisions are plainly subject to judicial review to determine their legality. Where, as is often the case, students’ or teachers’ rights are affected by the rule or decision in question, courts must determine whether those rights were impaired to a degree that renders the school’s action unlawful. Examples include rules regulating student appearance and publications, and hence their freedom of expression, and disciplinary procedures such as searches and detentions.

This is a sensitive area for courts to be involved in, because school decisions are plainly taken by those in the best position to know what is best for the school and its pupils. This does not mean that schools will always be right, but it should mean that judges pause before rushing to conclude they are wrong. It is significant that the first High Court decision on education after the 1989 reforms tackled this problem head on, setting out at some length the judge’s view on the appropriate role of the court in education disputes.

The case, *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478, grew out of a minor playground fight resulting in a primary school boy being spoken to by the principal. The boy’s parents complained to the principal over her handling of the matter, then withdrew their child from the school. There followed a lengthy series of complaints by the parents against the principal and the board. It would appear that there was no substance to these complaints and Williams J duly struck out the plaintiffs’ case as being incapable of success. The significance of the decision lies, however, in its discussion of the appropriate supervisory role of judges in educational disputes. Williams J reviewed the Act’s provisions on local community control through elections of school boards and, under the heading ‘Unsuitability of judicial review in relation to managerial role of school board’, said:

Against this background it seems clear that except in rare cases it would be wrong for the Court to intervene too readily in cases brought against Boards of Trustees in relation to purely managerial or administrative matters not seriously

affecting the rights of students. ... If such matters become contentious they should be negotiated, mediated and resolved at the local level. The legislation [the 1989 Act] is informed by the democratic belief that responsibility is the great developer of the citizenry and that issues of local educational administration are best left for resolution through the individuality of local communities. A tendency to turn always to the law for resolution of these matters would be unwise and inappropriate. ...

Indeed, even in cases where pupils' rights are concerned it seems to me, with respect, that there is need for very considerable judicial caution. In the sensitive area of education there is a significant risk that the courts will, in administering judicial review, unwittingly impose their own views on educational issues when they have no special competence for that task and the legislature has made it tolerably clear that such matters are not primarily judicial issues but rather issues of educational policy for school boards operating against the broad backdrop of the national educational guidelines.

There is undoubted wisdom in these remarks, which of course echo the more general debate, heard in countries with judicially enforceable bills of rights, over the proper balance of power between elected politicians and non-elected judges in a democracy. The approach of Williams J is likely to be adopted in future court challenges in New Zealand as it will serve to keep the judges out of educational disputes save where a school board has gone seriously wrong. I wonder, however, whether Williams J did not unwittingly pitch the threshold for judicial intervention a little too high for cases involving (unlike the case before him) alleged breaches of student rights. As Williams J noted (p 508), I have written elsewhere (see McLean, Rishworth and Taggart (1992), p 62) that 'vague assertions of deference or non-justiciability have now to survive the transparent particularisation ... which the Bill of Rights requires [in assessing whether it has been infringed in a particular case]'. The type of inquiry which I believe is required by the Bill of Rights might often lead to the same result as Williams J's approach. But it is important, in my view, that schools should be forced to articulate reasons for their actions and explain why it was necessary to infringe student rights if that is what has occurred. It is appropriate that judges should defer to the judgement of school boards that their actions were necessary and educationally sound, but they ought to be alert to ensure that schools do not intrude on rights more than reasonably required to attain the school's objectives. It would surely be wrong for judges to decline to make any inquiry at all, thereby leaving student rights to the mercy of an elected majority on a school board, simply because board members were elected by their community. I do not think Williams J would disagree with these points which, as I say, did not really arise on the facts before him. But an unfortunate impression was left by Williams J's paraphrase of American Supreme Court Justice Frankfurter's observations on the importance of leaving matters of fairness and justice to school boards rather than courts (pp 508-509). Justice Frankfurter's comments were made in the course of

his dissent in *West Virginia State Board of Education v Barnette* 319 US 624 (1943). There the other judges had upheld the rights of young Jehovah's Witness children not to be forced to salute the flag each school-day morning. If ever a case cried out for judicial vindication of student rights, it was that one. Justice Frankfurter's extreme deference to the local community's wishes in the matter is now seen to be well out of the mainstream in judicial approaches to rights adjudication.

The Right to An Education (1): Issues in Enrolment and Zoning

One of the major selling points of the new regime was that community responsive schools would better enable the 'pursuit of excellence'. Parents would, as it were, vote with their children's feet by sending them to schools whose performance they admired. Increasing rolls at good schools would bring increased funds and more educational opportunities for children. Schools could take pupils from anywhere. The opening provisions of the Act reflect these objectives.

First, the Act deals with entitlement. Free education at *any* state school is the right of every person from age 5 to 1 January following their 19th birthday (s 3). Second, the Act imposes obligations. All persons aged between 6 and 16 *must* be enrolled at a registered school, a term which includes private schools duly registered under the Act (s 20). Third, the Act restricts the power of a state school to turn away those seeking their education at that school. The only basis for refusal to enrol - apart from cases where special education is needed because of disability - is pursuant to an 'enrolment scheme' which is in place.

Enrolment schemes may only be imposed if a school board is satisfied that, without it, there is likely to be overcrowding at the school (s 11A). Public notification of the scheme is required, and such schemes must comply with the Human Rights Act 1993 which prevents discrimination in education (and in other fields) on thirteen grounds including race and national origin. (Note, however, that the Human Rights Act 1993 allows schools for students of one race, sex, or religious belief: see discussion below. But that is different from the matter under discussion, which is whether an enrolment scheme for an unrestricted school may discriminate on prohibited grounds.)

The operation of enrolment schemes has turned out to be one of the more visible and controversial aspects of the Tomorrow's Schools regime, especially in the metropolitan Auckland area. Two factors have combined to produce the problem. First, the natural bulge of baby-boom progeny is now at primary and secondary school. This has caused burgeoning school rolls in upper and middle income areas which are perceived to have good schools. Secondly, there has been a dramatic increase in immigration to New Zealand, especially under the business category which permits the immigration of wealthier people. These immigrants tend to value education highly, and seek homes in Auckland districts where local schools have good reputations. This fuels property prices, leads to high density in housing, and quickly to overcrowding in the 'successful' schools.

The implementation of enrolment schemes to deal with this overcrowding can be fraught with difficulties. One is that schemes may create zones within which students may enrol as of

right, yet there is no mechanism to ensure that neighbouring schools have contiguous zones. This can result in students having no entitlement to attend their closest schools. Ill feeling over enrolment schemes and zoning leads inexorably to concerns over immigration. The majority of recent migrants are from Asian countries and in many cases English is not their first language. They have, of course, an equal right to enrol their children in public schools but there is generally a need for extra language tuition. In times of limited funding this is perceived to come at a cost to English speaking children. In this situation tensions can arise, as they did in 1995 when newspapers reported that one Auckland school with roll pressures was about to implement an enrolment scheme which discriminated against Asian students.

This proposed scheme would have restricted enrolment geographically -which is standard in such schemes -but added a 12 month residency requirement within the zone. This was seen to penalise immigrants, more of whom would be recent arrivals in the area. Further, it was said the scheme would refuse entry for those who did not have adequate English language skills. In fact it was not clear that the school was about to implement any such scheme, but resultant public meetings and media interest nevertheless brought the language issue to national attention. The school pointed to statistics - that 10% of their incoming students spoke no English, that 25% operated below the literacy level in English, and that 40% spoke English as a second language. One of the positive outcomes of the incident was that the school received additional funding for language tuition. And independent political pressures in that particular district led to the rapid provision of a further primary school which commenced operation in 1996. That has relieved overcrowding, at least there.

But the question of linguistic minorities in schools will not go away. This has been faced in other jurisdictions, notably California where instruction in minority languages is possible in some districts so as to ensure that progress is made while English is being learned (Knight, 1996; Rishworth, 1993).

The Right to An Education (2): Suspension and Expulsions

Suspensions and expulsions have also been much in the news over the past five years. Suspension is the term applied to those under 16; expulsion is the term for those 16 and over for whom education is no longer compulsory. The relevance of the distinction is that while students under 16 are suspended from a particular school they remain subject to the statutory obligation to attend *some* school. Expelled students, of course, are not.

Given that state education is a student's right, one would expect suspension or termination of education to be surrounded by substantive and procedural safeguards. And, at least in theory, so it is. The doctrines of administrative law - the right to a fair hearing free of bias, etc - will apply and in some cases have done so with important effect as we shall see in a moment. But in practice the school suspension area remains deeply problematic because of the social consequences when schools exercise their powers. The number of school suspensions is high: 8850 in 1995, up 18% on 1994. While most of these are short term suspensions, indefinite suspensions and expulsions

approached 3000. And statistics published by the Ministry of Education in March 1996 indicated that around 975 children in the South Auckland area alone were 'lost between schools' -that is, suspended but not apparently re-enrolled anywhere (McElrea, 1996).

The problem, of course, is that suspensions may well be lawful but they do not necessarily solve underlying problems. Often they simply move the problem to another school, or out of the school system altogether in which case the problems may translate into crime and welfare dependency. Recently there have been calls for schools to seek a different approach. The suggestion has been made that suspensions ought not to be considered until after attempts at resolution through a 'family group conference' (McElrea, 1996). This is the 'restorative justice' model used under the Children Young Persons and Their Families Act 1989 for youth crime. It involves groups of family, supporters and professionals - and victims too, at their choice - being assembled to decide an appropriate response to the young person's admitted offending. This is said to work well in youth crime. Its potential utility in school contexts cannot be doubted but those involved in school administration point to the extra burden it would place on schools and community agencies, especially given that school boards are made up of volunteers who often have other jobs.

In the meantime the substantive law in the 1989 Act on suspensions is substantially the same as under the old Act. Principals, under section 13 may suspend students for:

Gross misconduct or continual disobedience setting a harmful or dangerous example to other students at the school; or
Where the student's behaviour makes it likely that the student or another student at the school will be seriously harmed if the student is not suspended.

School boards must affirm expulsions or suspensions for longer than seven days, and must apply the same criteria. A leading case on school suspensions, unfortunately not reported, illustrates that a school may not decide as a matter of general policy what type of conduct it will regard as constituting 'gross misconduct'. This decision - *M v Palmerston North Boys' High* (HC Palmerston North, CP 302/90, 5 December 1990, McGechan J) - apparently still perplexes school boards but it is plainly right. The school's policy was to treat the consumption of alcohol when under school jurisdiction as 'gross misconduct' leading to suspension. The policy was duly applied to students on a school trip though their consumption of alcohol was relatively minor. The Court held that the board decision to suspend was vitiated by its legal error in simply applying its 'alcohol consumption equals gross misconduct' policy and hence failing to apply the statutory test: was the *particular* behaviour of the student on that *particular* occasion such as to amount to gross misconduct? School boards cannot, in other words, augment the statute by making their own determinations that certain behaviour will always constitute gross misconduct.

Shades of the above arose recently in June 1996 at Cambridge High School. Fourteen students were indefinitely suspended for cannabis possession in pursuit of the board's apparent 'zero tolerance' policy. This was by no means an irrational response given that drug possession is

illegal. And there is nothing as yet to suggest that the school failed to make individual assessment of the statutory criteria for each student. But, although there has been no litigation, the Cambridge events have received national publicity and brought out once again the tension between community control and national values. Opinions have been heard from around the country as to whether the school board has acted wisely in terminating the enrolment of the 14 pupils, some of whose involvement was relatively minor. It has also been suggested that the suspension decisions were inconsistent with rights to education guaranteed to students in the United Nations Declaration of the Rights of the Child. And the Commissioner for Children has, in a response to the suspensions, called for a 'forum' to consider rising drug use in schools, as well as the whole issue of suspensions and expulsions and the provision of alternative education for excluded children. He has also suggested that some schools, striving to preserve reputation and profitable fee-paying Asian students (ie non-permanent residents), are too readily cleansing their student population of 'troublesome students' when there might be more that can be done for them (New Zealand Herald, 4 July 1996, p 4).

Educating for Biculturalism: the Maori Dimension in Education Law

New Zealand is increasingly being self-described as a bicultural nation. This is an allusion to the coming together of two cultures, English and Maori, in 1840 through the signing of the Treaty of Waitangi. That Treaty, in its English version, cedes Maori sovereignty to the Crown in return for a guarantee of continuing Maori property rights. New Zealand's legal evolution since then has proceeded largely on this basis, which requires no special protection of Maori concerns since English law protected their property just as it did that of all other races.

But the Maori translation, known as Te Tiriti o Waitangi, is significantly different. There the Crown receives not sovereignty but 'kawanatanga', and there is linguistic evidence that this meant something less than complete sovereign authority. Furthermore, Te Tiriti guarantees not merely property rights for Maori but 'rangatiratanga', or chiefly authority, over Maori property and 'taonga', a term now interpreted very broadly to mean 'all valued treasures' and hence extending to language and culture. Given that few Maori chiefs actually signed the English version, the Maori version plainly has much greater moral suasion. This translates into calls for the Government to respect Maori autonomy and to actively promote Maori language, which is presently in danger of dying out.

So called 'Treaty obligations' now have considerable impact across the full range of governmental activity. Orthodox legal doctrine is that the Treaty is not directly applicable in New Zealand law, but must be incorporated into legislation before it can be judicially enforced. Successive governments since 1984 have been ready to incorporate a Maori dimension into legislation in areas which clearly affect Maori interests. This sometimes requires some interpretive effort: the Treaty is brief and its literal words do not speak to every field of endeavour. The prevailing approach is therefore to look for the 'spirit' or 'principles' of the Treaty, so enabling the Treaty to speak to modern conditions. This reimagining of the Treaty's significance has been

in full flight throughout the late 1980s and it is no surprise that the Education Act 1989 contains a range of provisions designed to reflect what, in the Government's view, the Treaty required in the field of education. Whether those provisions go far enough to fully implement the Treaty notion of biculturalism might be debated. But the provisions of the Education Act relevant to Maori are now clear.

First, there are some important 'process' provisions. Schools putting their Charters in place are required by the Act to consult with their local Maori community, where appropriate. School boards are also empowered after their election to augment their number by appointing 'co-opted members'. The Act requires that they consider the ethnic mix of their community when co-opting. In this way most boards will seek Maori and Pacific Island members if they are not elected in the normal way.

The Charters themselves are deemed to contain certain aims of relevance to Maori. First, the aim of 'developing policies and practices that reflect New Zealand's cultural diversity, and the unique position of the Maori culture'; second 'the aim of taking all reasonable steps to ensure that instruction in Maori culture and Maori language are provided for full time students whose parents ask for it' (s 63). It will be noted that these aims inure to the benefit of all students. The Maori dimension is a part of our national heritage and is to be embraced or at least available to all; it is not just for Maori students.

There are other provisions in the Education Act which authorise special measures for Maori students. The Minister is empowered to establish kura kaupapa Maori -schools where Maori is the principal language of instruction -at the request of the parents of at least 21 potential students (s 155). Again, nothing requires that the students be Maori, although this is likely to be the case in practice. Kura kaupapa Maori can turn away potential students whose parents do not accept the aims, purposes, and objectives that constitute the [school's] different character. This provision should be seen in the context of a related provision which enables 'special character' schools to be established, similarly at the request of the parents of 21 potential students (s 156).

Should a kura kaupapa Maori school board wish to declare that only Maori students may attend it would be immunised from attack under the Human Rights Act 1993, since s 58(1) of that Act specifically allows schools to be maintained for students of one race, as well as for one sex or religious belief. This provision does seem a little troubling in so far as it applies to racial distinctions. As to sex, it obviously serves to ensure the continued lawful operation of single sex state schools (though it is redundant since single sex schools are also protected by s 3A of the Education Act). As to religion, it permits private religious schools and, indeed, state schools with religious character (the latter being a possibility since the Private Schools (Conditional Integration) Act 1975).

But the prospect of state funded schools which are limited to students of one race might one day be problematic. One assumes the Human Rights Act provision has been written on the assumption that any racial restrictions will be motivated by benign considerations, and that is plainly true of Maori schools that exist already and for whose benefit the provision was probably

included. But given that de jure racial discrimination is unconstitutional in other countries the express exemption to permit schools for different races in New Zealand does seem out of place.

There have been two significant controversies in recent times over Maori matters in education. The first concerned a primary school's attempt to make Maori language instruction compulsory, the second concerned a secondary school which was said to be not doing enough for Maori students.

The first issue arose at a Northland primary school where the school board had decided after community consultation to make Maori language instruction a core element of the school curriculum. Parents of one child objected to Maori being compulsory and the matter soon attracted national publicity. This was a particularly vivid example of the clash between community responsiveness and minority rights protected by central government. Procedurally, the school board had done everything correctly, and the prominence it sought to give Maori language fitted in with the compulsory Charter aims identified above as well as with the wishes of the largely Maori community. But legal proceedings were initiated seeking to challenge the board's decision. These were soon overtaken by political events. A bill was introduced into Parliament to amend the Education Act by the inclusion of what became s 25A - 'release from tuition on religious or cultural grounds'. The parental objection was then taken by the school to amount to a request for an exemption under s 25A based on the parents' sincerely held 'cultural views'. It never became necessary for the parents or school to articulate just what 'cultural view' might justify the exemption of a child from Maori language lessons.

In Parliamentary debates over the amendment to introduce s 25A it was labelled the 'Broadwood School clause' - a reference to the school involved suggesting that the amendment was motivated by a governmental desire to defuse political problems over Maori language being forced on unwilling pupils. But now that s 25A is in place other potential beneficiaries are religious minorities seeking exemptions from tuition antithetical to their belief, perhaps in relation to the evolution/creationism issue. In particular, s 25A would defuse disputes such as those involving fundamentalist Christians in the United States who are unhappy with the perceived anti-religious message of school readers (see Bates, 1993).

The second and rather more significant educational dispute over Maori occurred at Waitara High School in 1992. Complaint was made under the Human Rights Commission Act 1977 that the school had discriminated against Maori students by reason of the cumulative effect of a number of actions and omissions. These included allegations that the room in which Maori was taught was in an undesirable part of the school, that the school had long delayed in filling a vacancy for a Maori language teacher, that the headmaster had unreasonably denied requests by Maori students for special consideration to allow attendance at an outside event, and so on. It was said that the school thereby failed to provide education for Maori in a manner which affirmed their language and culture.

In a decision which is unfortunately unpublished and hence not publicly available, the Human Rights Commission substantially accepted the Maori claimant's case. It held that the complaint 'had substance' and should be accepted for mediation. Though the School could maintain that

there was no discrimination since its shortcomings were suffered by all students of all races, the Commission concluded that Maori were particularly affected and, while English language and culture were affirmed, Maori language and culture were not. The complaint was successfully mediated and so no further exploration of the interesting legal issues was required. Those issues would have included whether the school's various sins of omission and commission could properly be lumped together to attain a 'cumulative effect', and whether there is any principled basis for not applying the same reasoning to, say, a Latvian or Kazak student whose language and culture is similarly not 'affirmed' in a school.

If the case had been characterised as indirect discrimination - that is, discrimination wrought unintentionally in the pursuit of other goals - then its implications might be more easily contained. Section 65 of the Human Rights Act 1993 permits a defence of 'good reason' to claims of indirect discrimination and there will no doubt be good reasons why Latvian and Kazak language and culture are not affirmed, which would not apply to Maori students especially given the compulsory Charter provisions. But this analysis was not open to the Human Rights Commission in 1992 because, under the old Human Rights Commission Act 1977, there was no prohibition on indirect discrimination; only a perplexing prohibition on 'discrimination by subterfuge' which was really another concept altogether. The Commission appears therefore to have strained to find direct discrimination in the Waitara case given that a finding of indirect discrimination was not open to it. Its subsequent reported reasoning in an indirect discrimination case under the 1993 Act - the Muslim school uniform case discussed below under freedom of religion - would suggest that if the Waitara case were to reoccur it would be treated differently now that indirect discrimination is plainly prohibited.

Affirmative Action and Equality

The controversial issue of affirmative action in education arose early in 1996 in *Amaltal Fishing Co v Nelson Polytechnic* [1996] NZAR 97, a decision of the Complaints Review Tribunal (the body which hears complaints of discrimination under the Human Rights Act 1993 which have not been successfully mediated before the Human Rights Commission). Before discussing the impact of the *Amaltal* case it is worth setting out the background to the relevant New Zealand law on affirmative action. This area of law is completely unexplored territory, and the *Amaltal* decision did not, as we shall see, venture very far into it.

The Human Rights Act, like its predecessor the Human Rights Commission Act 1977, contains a specific prohibition on discrimination in admission to educational institutions (s 57). Amongst the prohibited grounds of discrimination are, as one would expect, race and ethnic origin. So far as public sector agencies are concerned, that prohibition is repeated in s 19 of the New Zealand Bill of Rights Act 1990 which prohibits discrimination by public actors on 'the grounds set out in the Human Rights Act 1993'.

If that were all these Acts contained on the matter then we could have expected in due course to have had litigation along the lines of the famous *Bakke* case in the United States

(*Regents of the University of California v Bakke* 438 US 265 (1978)). It will be recalled that Mr Bakke, as a white person, could compete for only 84 of the 100 places available at the Davis Medical School, whereas a black or Hispanic could compete for all places as well as having exclusive opportunity to compete for the quota of 16 places allocated to those groups. The United States Supreme Court was deeply split on the fundamental issue whether so-called benign discrimination contravened the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment. Indeed, it was the 'swing vote' of Justice Powell which decided the case. He held (with four of the judges) that the use of fixed quotas was unconstitutional but that the use of race as a positive factor in admissions' decisions was permissible. Admissions' schemes since then have taken race into account as a positive factor to foster student diversity.

Similar litigation might have been possible in New Zealand. Although our Bill of Rights is not entrenched as supreme law this would have been immaterial in the education context. Admission preferences in educational institutions are merely administrative practices, not statute law, and our Bill of Rights and Human Rights Act could each have rendered them unlawful. However, the New Zealand legislation, like its Canadian equivalent (see s 15(2) of the Canadian Charter of Rights and Freedoms), seeks expressly to immunise affirmative action programs from challenge. Both the Bill of Rights and the Human Rights Act each prohibit discrimination but go on expressly to allow affirmative action. The difficulty is that, whether by accident or design, they appear to do so in different ways. First, the Human Rights Act provides:

s73 Measures to ensure equality -

Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part of this Act shall not constitute such a breach if-

- (a) It is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part of this Act; and
- (b) Those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.

On the other hand, the Bill of Rights exempts:

Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.

It can readily be seen that the two provisions differ. The Bill of Rights requires that any special measures be addressed to groups of persons 'disadvantaged *because of* discrimination', a phrase requiring inquiry into (i) whether the group is disadvantaged, (ii) whether there has been past discrimination against the group, and (iii) whether the disadvantage was produced as a result of

this discrimination. In contrast, s 73(1) of the Human Rights Act enacts an apparently lower threshold for affirmative action - can the group reasonably be supposed to need advancement to gain an 'equal place with other members of the community' (a colloquial phrase with major interpretative problems of its own). This requires no showing that the group to be assisted has actually been disadvantaged through discrimination. Presumably the section is predicated on the assumption that any inequality is, by definition, produced by past systemic discrimination.

A further complication arises out of the fact that tertiary educational institutions have additional specific obligations placed upon them. Section 181 of the Education Act requires them to 'acknowledge the principles of the Treaty of Waitangi', and to encourage participation of 'under-represented groups'. The section then adds, rather cryptically, that tertiary institutions must ensure they do not 'discriminate unfairly' against any person, a proposition that might be thought to beg the central question about affirmative action. That central question is difficult enough in itself; it is a pity to see it needlessly complicated by having to unravel the meaning of the various statutes which apply, and deciding which is to govern the matter. There are plainly deep waters to be navigated in the affirmative action debate in New Zealand, but there is no space to begin that process here.

Against this background, the 1996 *Amaltal* decision turns out to be blissfully free of complications. Nelson Polytechnic ran fishing cadet courses with public money, and reserved all 14 places in a 1994 course for Maori and Pacific Island students. Amaltal, a fishing company, objected on behalf of aspiring but ineligible students. When the case came to a substantive hearing Nelson Polytechnic simply declined to appear to defend its admissions scheme. Hence no evidence was adduced to satisfy the crucial s 73(1) requirement that Maori and Pacific Island students were 'reasonably ... supposed to need assistance' in order to achieve 'an equal place with other members of the community'. Neither of the other potentially relevant statutory provisions were argued. The Tribunal understandably held that the s 73(1) defence must fail without evidence to establish it (although the Tribunal took almost a year to deliver a reserved decision to that effect). The admission scheme in force in 1994 was declared to be unlawful.

This case led to extreme comments from various quarters, especially from those suggesting that it signalled the end of affirmative action schemes. Plainly it did not. But, though uncontested and hence not particularly enlightening, the case is nonetheless significant in one respect. *Amaltal* should remind all educational institutions that affirmative action schemes are lawful only to the extent allowed by law. Unfortunately it then becomes necessary to consider the three relevant legislative provisions - ss 73(1), 19(2) and 181, and the interplay between them - in order to work out what the law actually is.

Students' Rights and School Powers

The lawful powers of schools are explicitly limited by the provision that they are subject to the common law and to all enactments of the New Zealand legislature (s 75). This formulation of school powers is, at first sight, perplexing. Obviously other legislation must control school

powers, but it is less obvious that all common law doctrines should do likewise. The common law includes the torts of trespass and false imprisonment. On the face of things it would seem that no coercive school rule could ever be promulgated which might require the attendance of students at a particular place and time. Indeed, the very idea of that time honoured disciplinary measure, the 'detention', would be undermined by the provision that common law prevail of false imprisonment over school power. Yet if there is anything certain about compulsory education it is that some basic liberties of students are and must be limited by the operational requirements of schools. First, they must attend the school even if they would rather be somewhere else. Second, once there, they must obey lawful rules. Schools are not, therefore, places of complete liberty. Therefore, s 75 must be interpreted in a practical way so as to mean that the general common law freedoms of students are overridden at least to the extent required to give effect to the Education Act. There is really no difficulty in reading the statute this way, for the 'common law' of which it speaks can readily be taken to mean 'the common law as modified by the passing of this [the Education] Act'.

The question then becomes how far this necessary amplification of school powers will extend. It certainly facilitates some coercive powers over students sanctioned by the Act's disciplinary provisions, but does the Education Act contemplate also a power to invade the personal privacy of a student in order to further the educational mission of the school? The question has arisen in recent years in connection with the vexed question of school searches. When, if ever, may school teachers search the person or property of a student for illicit items such as drugs or stolen property?

As is typical in education disputes, the question arises out of particular incidents which attract national publicity, but which do not lead to judicial decisions. Over a number of years newspapers have carried stories of strip searches perpetrated on school students by teachers, and in one case locker 'searches' carried out by police with a drug-detecting dog that sniffed the surrounding air. Two incidents in particular stand out; the 1991 strip search of boys at Napier Boys' High School and a 1994 strip search of girls at Auckland's Otahuhu College. The former event did not lead to litigation but was the subject of an inquiry by the Commissioner for Children, whose report is recorded in [1990-1992] NZBORR 480.

The Otahuhu college incident in 1994 did lead to litigation. This involved the strip searching (down to underclothing which was itself inspected although not removed) of an entire fourth form female class by two teachers, in pursuit of a stolen \$15. Proceedings were filed for causes of action in tort and for breach of the right to be free of unreasonable search as guaranteed by the New Zealand Bill of Rights Act 1990. A confidential settlement was confirmed by the High Court in March 1996 (such confirmation being required because the plaintiffs were minors). As a result no judicial decision was required on the legality of searches in schools.

In these circumstances the legality of searches in schools remains unsettled. On one side of the debate are those who say that no invasion of the person or property of students is authorised by the Education Acts. Those taking this view would recognise that the Bill of Rights permits a reasonable search but cannot itself empower one. School power is to be found in the Education

Act and it is silent on searches. On this view, such searches as are perpetrated in schools must fall to be justified, if at all, on the basis of student consent to being searched.

I have expressed an alternative view on the legality of school searches (Rishworth, 1996a). It is that the Education Act implicitly empowers reasonable searches in the school context where they are conducted to secure the maintenance of a sound educational environment. This draws on the approach taken in American jurisdictions. A 'power' to search necessarily implies that searches can be perpetrated without student consent. However, the power is limited by the requirement that it be exercised reasonably, in conformity with s 21 of the Bill of Rights. In particular, in my view, the requirement of reasonableness means:

- searches are not in general to be perpetrated without reasonable grounds to suspect the presence of illicit material on a particular student. In particular, blanket or drag-net searches without individualised suspicion are likely to be unreasonable.
- force may not be used to perpetrate personal searches. Hence, in practice, the cooperation of students must be enlisted to remove outer articles of clothing such as jackets and sweaters for inspection.
- strip searches to undergarments are likely to be unlawful in all but extreme situations where imminent physical danger is sought to be averted, either to the student involved or others. This is because the degree of invasion of privacy is greater, and a corresponding urgency and gravity is required before such an invasion can be reasonable.

It is likely that sooner or later the legality of school searches will be authoritatively explored in litigation. The type of case in which it will probably occur is one where the student is prosecuted for possession of drugs, and the lawfulness of the search is raised as a 'Bill of Rights' point as a ground for exclusion of the evidence. For students seeking redress as plaintiffs for allegedly unreasonable searches the Privacy Act 1993 might be more productive than civil litigation. That Act lays down principles about the collection and use of 'personal information', a term wide enough to include the facts about material found on a student or in a bag or locker. An unreasonable search is likely to be, by definition, a breach of one of the Act's 'privacy principles'. The Privacy Act permits mediations and settlements along the same lines as the Human Rights Act 1993, and where there is no mediated solution the matter may be pursued without cost to the complainant. So the Act is likely to be cheaper and easier for an aggrieved student than litigation.

Freedom of Religion Issues in Schools

Primary education in New Zealand is expressly to be secular (s 77 of the 1964 Act, called the 'secular clause'). But schools may technically 'close' for up to one hour per week to permit religious instruction or religious observances (s 78). Not all schools do this, but many do.

Instruction is typically provided by persons from the community, predominantly in the Christian faith.

For secondary schools there is no requirement that education be secular and, correspondingly, no specific authorisation to notionally 'close' a school for religious observance. That said, some form of religious observance such as hymn singing or Bible reading is still to be found in some secondary schools at least on an occasional basis. There was litigation in the 1970s involving the legality of hymn singing in a state secondary school. This was readily resolved in the school's favour on the basis that such a practice, especially when allied with provision for an 'opt out', was not an unreasonable exercise of the board's power to manage (*Rich v Christchurch Girls' High School Board of Governors* [1974] 2 NZLR 1 (CA)).

The enactment of the New Zealand Bill of Rights Act 1990 and Human Rights Act 1993 now raises fresh grounds for challenge to religion in schools. The former's guarantee of 'freedom of religion' cannot of itself be invoked to challenge religious instruction in a primary school given that the 1964 Act expressly allows it, but the position is different in secondary schools. There has, as yet, been no suggestion of litigation over the matter, but it remains a possibility.

The Human Rights Act 1993 raises different concerns. Although primary schools are permitted to have religious instruction there is no statutory mandate for limiting this to the Christian religion. Accordingly there is scope for claims that any school operating religious instruction in the Christian faith only is discriminating against those belonging to other religious traditions (or to none). It is understood that claims of this type have indeed been made to the Human Rights Commission but there has been no public notification of whether or how they have been resolved. (see also Rishworth, 1993 and 1995).

It is understood that there are legislative proposals to abolish the secular clause in primary education, together with the allied provision for religious instruction when schools are 'closed'. If this happens the legislation will be silent on matters of religion in primary schools just as it presently is for secondary schools. In the event that religious observance is held to be consistent with the Bill of Rights, then schools would be free to have it (subject to the Human Rights Act). If held to be inconsistent with the Bill of Rights then no school could have it. These issues are, of course, well traversed in the United States and Canada but there is no necessary reason why they would have to be resolved the same way here. An intriguing foreshadow of possible debate to come was the announcement by a kindergarten association prior to Easter 1996 that it discouraged the use of hot cross buns in pre-schools because of their association with Christian religion.

A different type of religious discrimination claim was made concerning a compulsory uniform rule. An Auckland secondary school required junior students to wear short trousers. A Muslim student complained that this was discriminatory. The Human Rights Commission agreed and mediated a settlement which allowed the student an exemption (*K v M, C149/94*, noted in (1995) 1 *Human Rights Law & Practice* 34; see also Rishworth, 1996b). This is unremarkable, but it should be noted that the Commission rightly characterised this as a case of indirect discrimination - a generally applicable rule which impacted adversely upon Muslims - rather than direct discrimination. I suggested earlier that this may indicate a retreat from the position

implicitly taken by the Commission in the Waitara School Board case, where it will be recalled the school's general performance was labelled *direct* discrimination when it adversely affected Maori students compared to non-Maori students. Another interesting feature of the Muslim uniform case is that the school apparently made an attempt to argue that the student was not interpreting the dictates of his own religion correctly! This bold claim was rightly given no weight by the Human Rights Commission.

Freedom of Expression Issues

Of teachers

We have not had litigation in New Zealand along the lines of the major cases in Canada involving holocaust-denial by school teachers (see *R v Keegstra* [1990] 3 SCR 697; *Ross v New Brunswick School District No 15* (Supreme Court of Canada, 3 April 1996). In the second of these cases it was held that the anti-Semitic activities of a teacher *outside* the school 'poisoned the environment' for Jewish children, and the school board was rightly held to have discriminated by failing to remove the teacher from the classroom. The closest we have come to a case about the private life of a teacher is the case of *Balfour v Attorney-General* [1991] 1 NZLR 519. An allegation was made to a school principal that Balfour, then a teacher at the school, was homosexual. Balfour resigned, but subsequently sought to enter a training program to teach deaf pupils. He was rejected for this and obtained further teaching employment only after making more than 100 applications. He then discovered a notation on his personal file in the Department of Education that he was a 'long standing and blatant homosexual'. He sued for damages for negligence and breach of statutory duty, contending the Department owed a duty of care to make such notations only after proper inquiry. However, observing that 'many injustices are done for which the law can provide no redress', Hardie Boys J for the Court of Appeal dismissed Balfour's claims. First, no causal link could be shown between the file note and the difficulties in employment. Further, policy reasons for a finding against Balfour were that the tort of negligence was here being invoked in a context which brought it 'perilously close to defamation': an alleged duty not to defame. It was held that the Department's wider duty required that it be free to make such notations on personal files without being required to pursue verification in every case. Put in defamation law terms, this is essentially the same as saying that the defence of qualified privilege applied. This type of case is perhaps less likely to happen now; the offending file note arose out of rumours which began in 1980. Much has happened since then in community attitudes, including the enactment of the Human Rights Act 1993 which now precludes discrimination in employment on the grounds of sexual orientation.

Students' freedom of expression

Back in the late 60s and 70s the constitutionality of hair length restrictions for students attracted an extraordinary amount of litigation in the United States. Most courts accepted that personal

appearance was 'expression' protected by the First Amendment to the United States Constitution, but courts have differed from state to state over whether personal appearance standards imposed by school boards are permitted (Price, Levine and Cary, 1988). Even in the New Zealand of the 1970s, with no constitutional guarantees of free expression, hair regulations were litigated (*Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (CA), one of the two reported school suspension cases). The challenge in that case was framed in administrative law terms rather than individual rights - it was said that no reasonable school board could impose a regulation requiring hair to be worn above the collar, particularly as such a rule necessarily affected students outside school hours. But, foreshadowing the approach to judicial review advanced by Williams J in *Maddever*, the New Zealand Court of Appeal rejected the challenge, emphasising that the hair regulation was imposed by a representative school board which must be taken to reflect community standards with which courts should not lightly interfere.

The enactment of the New Zealand Bill of Rights Act 1990, with its statutory guarantee of freedom of expression, raises anew the prospect of legal challenges to appearance rules. Because fashions have changed - the students of the 1970s are now likely to be parents and board members - the current controversies now surround not hair length but facial hair. One Auckland school's clean-shaven policy received brief notoriety in 1995 and attracted speculation from some legal commentators that in the Bill of Rights era such a rule was unlawful. And earlier this year a Wellington pupil was ordered to remove a beard and the ensuing controversy made the evening newspaper (*Evening Post*, 30 April 1996).

Neither incident attracted legal challenge, and it is not known whether suspensions were imposed or confirmed by school boards. But my own prediction is that legal challenges would fail since courts will be unwilling to be drawn into disputes about what hair length or facial hair policy is appropriate for a school. That said, there will be exceptions mandated by law. Some Pacific Island races have traditional customs involving long hair for young boys which is eventually cut in a special ceremony. There has never been any suggestion of a school attempting to enforce its appearance rules on these students. But if there were, it would amount to an interference with s 20 of the Bill of Rights - the right of a member of a minority to 'enjoy the culture' of that minority.

A second aspect of 'appearance rules' is the compulsory school uniform. Some years ago the Ombudsman investigated the issue and accepted that schools had the power to mandate uniforms. But there has been speculation from a youth advocacy organisation that, in the Bill of Rights era, uniform rules are of uncertain validity because they limit freedom of expression (Youth Law Project, 1993). The issue is not academic, as a number of schools have had controversies about uniform rules in the past and in one at least the issue is still alive. In these circumstances the expression of doubts about the legality of mandatory uniforms adds a further complication to an already difficult matter. For, quite apart from Bill of Rights concerns, schools introducing compulsory uniform rules that are opposed by a substantial majority must reckon with widespread rebellion and the possibility of multiple suspensions for 'continual disobedience'. When student disobedience is waged over a philosophical objection to a uniform rule which is supported by their parents then any resulting suspensions are guaranteed to be controversial. My

own perception, however, is that the decision to adopt or not adopt a school uniform is well within the range of reasonable decisions which a school board may make. But the wisdom of doing so over significant opposition may be doubted.

Conclusion

This catalogue of current and recent education law controversies should end with a few words about the bigger picture. On the whole, the 1989 reforms to educational administration seem to be working well at grass-roots level. There is nowhere near the level of public dissatisfaction as is found, for example, with the restructured health service. There are, of course, aspects of education policy which remain politically contentious. The principal areas of contention at present concern funding levels for education at all levels, low teacher salaries in primary and secondary schools which are said to make recruitment difficult, and rising student fees for tertiary education. But the underlying administrative structure through which education is delivered is likely to remain for the foreseeable future.

Keywords

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| Education | Students |
| Human Rights | Discrimination |
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